

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA  
HARRISBURG DIVISION

RICKY A. SHAW, : CASE NO.  
Plaintiff : 1:09-CV-00359  
vs. :  
CUMBERLAND TRUCK :  
EQUIPMENT COMPANY, : Harrisburg, PA  
Defendant : 18 May 2011  
..... : 9:32 a.m.

TRANSCRIPT OF CIVIL JURY TRIAL, DAY 3  
BEFORE THE HONORABLE CHRISTOPHER C. CONNER  
UNITED STATES DISTRICT JUDGE

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I N D E X  
Ricky Shaw vs. Cumberland Truck Equipment Co.  
1:09-CV-00359  
Civil Jury Trial, Day 3  
18 May 2011

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P R O C E E D I N G S

THE COURT: Good morning. Please be seated. Ladies and gentlemen, we were going to proceed with Mr. Shaw's testimony and I know that defense counsel had a number of questions, but because our next witness is a medical doctor we've agreed to take him out of order, and I believe that the examination of this gentleman will be relatively short. So we'll take care of him, get him on his way so he can see his patients, and we'll return with Mr. Shaw. All right? Ms. McKinney, would you swear in the doctor?

(Dr. Andrew Walker, M.D. was called to testify and was sworn by the courtroom deputy.)

COURTROOM DEPUTY: Please be seated and state your full name for the record.

THE WITNESS: Andrew Walker.

DIRECT EXAMINATION BY MR. CROCENZI:

Q. Dr. Walker, good morning.

A. Good morning.

Q. I'd first like to talk about your credentials. You are a medical doctor, is that correct?

A. Correct.

1 Q. And can you tell the jury your background  
2 in terms of your education, beginning with  
3 college and working your way through medical  
4 school, residency, and so forth.

5 A. No college. It's not a joke. Medical  
6 school started in Poland. We don't have a  
7 college system, so you jump over after high  
8 school, but it's equivalent. Medical diploma  
9 obtained in the 1990. Board certified in  
10 internal medicine, practice the clinical  
11 medicine since up to residency. Running office  
12 clinic service as a hospitalist, and since 19 --  
13 no, since 2003 medical director of the  
14 occupational medicine and urgent care system.

15 Q. Where did you receive your medical diploma  
16 from?

17 A. University of Medical Academy in Krakow,  
18 Poland.

19 Q. Did you do your residency training in the  
20 United States or in Poland?

21 A. Former polyclinic medical center residency  
22 program.

23 Q. What was the residency program in?

24 A. Internal medicine.

25 Q. Now, you said that since 2003 you have been

1 a medical director of an urgent care center, is  
2 that correct?

3 A. That is correct.

4 Q. What is the name of that center?

5 A. Concentra Medical Center.

6 Q. What are your duties as medical director of  
7 Concentra?

8 A. Clinical care and daily operations.

9 Q. Where is Concentra located?

10 A. My center is located at the Rosemont Park  
11 off Wesley Drive in Mechanicsburg.

12 Q. Are you licensed to practice medicine in  
13 the Commonwealth of Pennsylvania?

14 A. Correct.

15 Q. Can you tell the jury how Concentra  
16 operates, meaning what type of patients you see,  
17 how many employees you have? Just give us a  
18 sense of the day-to-day operations.

19 A. Concentra is a national company currently  
20 operating probably about 400 to 450 clinics like  
21 mine all over the country in probably in 45  
22 states. Part of the operation is occupational  
23 medicine. Part of the operation is the  
24 traditional urgent care. It's like a small  
25 emergency room without the support of the

1 hospital.

2 Q. What kind of emergencies do you see?

3 A. It's a broad spectrum, anything from simple  
4 cuts and the sinus infections to heart attacks  
5 and a rupture of the aortas. Some of them can  
6 be managed and discharged from our clinic. Some  
7 of them have to be transferred to the hospital.

8 Q. In addition to the urgent care that you  
9 just described for us do you have patients who  
10 just make appointments for treatment for  
11 nonemergency cases?

12 A. In case of -- the simple answer is yes.  
13 Some patients, returning patients still under  
14 the urgent care principles, some of them are  
15 returning scheduled like for example in  
16 occupational medicine where we manage some  
17 occupational medicine related, work related  
18 injuries.

19 Q. Is your Concentra different than like a  
20 family doctor, community family doctor where  
21 you're treating people from childhood through  
22 adulthood for a variety of problems?

23 A. That is correct. In general terms  
24 Concentra medical centers do not provide the  
25 chronic care. The model is more based on

1 emergency medicine treatment with additional of  
2 the fact that we still are scheduling patients  
3 for follow-ups if necessary if certain issues  
4 have to be secured or better secured in our  
5 center than in office of family doctor.

6 Q. All right. Now, doctor, do you, does  
7 Concentra have any relationship with companies  
8 in the surrounding area regarding treatment for  
9 their employees?

10 A. That is correct.

11 Q. Can you describe for the jury that  
12 relationship?

13 A. The goal of occupational medicine -- I'm  
14 going to take it back. In the state of  
15 Pennsylvania employees -- sorry, employers, i.e.  
16 the owner of a company or a corporation has the  
17 right to select a panel of physicians to which  
18 their injured employee will be directed in case  
19 of any work related injury. Concentra is on a  
20 panel of many local companies, the work sites.  
21 The way it works is at the moment when the  
22 injury happens you don't need any scheduled  
23 appointment. The injured employee is sent  
24 immediately, or that's the presumption, to  
25 Concentra, and the employee is not going to be,

1 this patient is not going to be turned down  
2 because there is no appointment scheduled. At  
3 the moment the injured employee comes in, it's  
4 like an emergency room, they will be seen that  
5 day.

6 Q. And do you provide other services to  
7 companies in the area besides treating injured  
8 workers?

9 A. Yeah. Okay, I see where the question is  
10 going. There's a full spectrum of different  
11 other services that we provide to those  
12 companies. This may be preemployment physical,  
13 annual physical examinations, DOT/CDL truck  
14 driver certification, marine certifications,  
15 emergency personnel certifications, anything  
16 that would be put under the umbrella of physical  
17 examination of the prospective or current  
18 employee.

19 Q. What about drug testing? Do you do that,  
20 too?

21 A. Correct.

22 Q. Do you know whether Concentra at your  
23 location in Mechanicsburg has that kind of  
24 relationship you just described for us with a  
25 company called Cumberland Truck Equipment



1 Company?

2 A. Correct.

3 Q. Correct, you know that that is the case?

4 A. That is correct.

5 Q. I'm going to show you what has already been  
6 admitted as Plaintiff's Exhibit 7. It should  
7 come up on your screen there, doctor.

8 Disregarding what's handwritten on the form now,  
9 doctor, can you identify that form for us?

10 A. Yes. That's a form with which the patient  
11 comes to our office if it's directed by the  
12 company for any particular reason. This form  
13 has in the right middle section the indication  
14 what is the purpose of the visit. In this  
15 particular case the indication is that the  
16 patient is for a physical examination.

17 Q. Do you provide these kind of forms to the  
18 employers you have relationships with?

19 A. Correct.

20 Q. Thank you. Doctor, I want to ask you some  
21 questions about the personnel that are at  
22 Concentra. Obviously you're the medical  
23 director. The time frame we're dealing with is  
24 2007. So can you describe to the jury what kind  
25 of personnel you had employed at Concentra and

1 what they did there?

2 THE COURT: You're talking specific to the  
3 Wesley Drive Rossmoyne Business Center location?

4 Q. Yes, Your Honor. Thank you.

5 A. Usually there is, we have about 1 or 1.5  
6 provider in a sense it's either just one solo  
7 physician at the particular time. At certain  
8 points there might be another physician. There  
9 might be occasionally a physician assistant,  
10 nurse practitioner, and then there's a mid-level  
11 staff, the support staff. We're talking about  
12 medical assistants, nurses, radiologist,  
13 technician, physical therapists, that's pretty  
14 much --

15 Q. Okay. In 2007 did you have a physician  
16 assistant working out of the Mechanicsburg  
17 office with you?

18 A. Correct.

19 Q. Do you remember his or her name?

20 A. Yes. It's the Shelley Latsha. As I recall  
21 now it's going to be --

22 THE COURT: L-A-T-S-H-A?

23 A. Yeah, that's pretty much it.

24 Q. And what about a nurse practitioner? Did  
25 you have one employed in '07?

1       **A.** If there was a nurse practitioner, that  
2 particular gentleman is floating between  
3 offices. So occasionally he can work in my  
4 office or one in the four other Concentra  
5 offices in central Pennsylvania.

6       **Q.** Do you remember his name?

7       **A.** Scott.

8       **Q.** Is Shelley a woman or a man?

9       **A.** Shelley is a female, correct.

10       **Q.** For the physician's assistants can you  
11 describe for the jury what role you have in  
12 supervising them with their work duties at  
13 Concentra?

14       **A.** Any time if they have any questions  
15 regarding the process of examination findings on  
16 examination or determination that they have to  
17 render they have a right to approach me and we  
18 can discuss it.

19       **Q.** Can you describe for the jury what  
20 authority the physician assistant has in  
21 conducting a physical examination of somebody  
22 who comes to Concentra?

23       **A.** They have the same right to perform the  
24 physical examination as they are trained and by  
25 the nature of their schooling to do that.

1 Q. Do they do the physical examinations on  
2 their own or are you with them during the  
3 physical examination?

4 A. They are doing the physical examination  
5 their own.

6 Q. At the end of the physical examination what  
7 role do you have in reviewing any paperwork or  
8 meeting with the patient?

9 A. It varies from case to case. In some cases  
10 if they have questions about the decision they  
11 are going to be making or any findings that  
12 they, their findings, they are discussing those  
13 helping them to make the decision.

14 Q. And if they don't have any questions, what  
15 happens then?

16 A. They are signing the document and document  
17 is, it depends now what type of examination it  
18 was. Was this the okay examination, fitness for  
19 duty examination, it's filed and the information  
20 is provided to the employer who requested this  
21 information.

22 Q. Do you have any requirement for signing off  
23 on any physical examinations after the physician  
24 assistant completes the physical examination and  
25 makes a determination?

1       **A.** It varies from type of examination to type  
2 of examination and from company to company.

3       **Q.** Do you know if Cumberland Truck had any  
4 requirement for you to sign off on any of the  
5 examinations of their employees?

6       **A.** Not to my recollection.

7       **Q.** Doctor, do you have the records for  
8 Mr. Shaw in front of you?

9       **A.** Correct.

10       **Q.** You brought those from your office today?

11       **A.** Correct.

12       **Q.** When was the first time your office  
13 examined Mr. Shaw?

14       **A.** February 26th, '07.

15       **Q.** Did you conduct the examination of Mr. Shaw  
16 on that date?

17       **A.** Negative.

18       **Q.** Do you know who did based on your review?

19       **A.** Shelley Latsha, the PA, physician  
20 assistant.

21       **Q.** Were you present at all during any of the  
22 history taking that the physician's assistant  
23 did on February 26th, 2007?

24       **A.** Negative.

25       **Q.** Were you part of any of the physical

1 examination?

2 A. Negative.

3 Q. Do you know whether any x-rays were taken  
4 of Mr. Shaw during that February 26th, 2007  
5 appointment?

6 A. No.

7 Q. Were there any x-rays taken?

8 A. No, negative.

9 Q. Sorry, thank you.

10 THE COURT: I'm sorry, you do know and there  
11 were no x-rays taken?

12 A. I know that there were no x-rays taken.

13 THE COURT: Thank you.

14 Q. Based on your review of the records that  
15 you have in front of you did you have any  
16 medical records for Mr. Shaw available to  
17 Concentra during the time of the examination  
18 on 2-26-07?

19 A. Let's see. One moment. Not at that time.

20 Q. Does your record indicate whether anybody  
21 from Concentra contacted any of Mr. Shaw's  
22 treating physicians during the 2-26-07  
23 examination?

24 A. No.

25 Q. Did Concentra contact Cumberland Truck

1 Equipment Company or any representative of that  
2 company before performing the physical  
3 examination?

4 A. The simple answer to this question is no.  
5 It's the communication goes in the opposite  
6 directions, the company is contacting us and  
7 requesting the examination.

8 Q. And in fact you received what I showed you  
9 earlier, which is P-7, the authorization for  
10 treatment?

11 A. Correct. That's the authorization for  
12 physical examination. It's not for treatment.

13 Q. Okay. So when you received this and  
14 Mr. Shaw shows up, that gives Concentra  
15 permission then to do the examination, is that  
16 correct?

17 A. Correct.

18 Q. Now, for these kinds of examinations does  
19 the employee need to have an appointment with  
20 Concentra?

21 A. Most of the time not.

22 Q. They just show up?

23 A. Correct.

24 Q. Doctor, I'm going to show you what has been  
25 marked for identification as P-8. Can you

1 identify P-8 for us, please?

2 A. Correct. It's the cover sheet of the  
3 records for any visit.

4 Q. Is that a typical form that Concentra uses?

5 A. Correct.

6 Q. Is that the form that was used for  
7 Mr. Shaw's appointment on 2-26-07?

8 A. Correct.

9 Q. What does that form indicate regarding the  
10 contact with Cumberland Truck after the exam?

11 A. There is the information that the record  
12 was faxed to the above number and that should  
13 be, yes, it's right over here, 249-9058.

14 Q. Does Concentra typically fax results to the  
15 company after a physical examinations?

16 A. It's either faxed or it is transferred  
17 electronically. In this particular case the  
18 indication is it was faxed.

19 Q. Thank you. Did Concentra receive any  
20 direction other than what you saw on the  
21 authorization treatment form from Concentra  
22 regarding the physical examination of Mr. Shaw?

23 THE COURT: You mean from Cumberland Truck?

24 Q. From Cumberland, I'm sorry. Basically did  
25 Cumberland Truck give you any direction about



1 how to do the examination other than what you  
2 saw on that authorization form?

3 A. Let me double check.

4 Q. Sure.

5 A. No. Correction, just to clarify this.

6 Q. Uh-huh.

7 A. The purpose of this examination was the  
8 fitness for duty as it's indicated in the lower  
9 portion of this document you just handed to  
10 me. It's quite particular physical examination,  
11 it's not an annual physical examination,  
12 preemployment. It's called a fitness for  
13 duty. So it might be that there was a phone  
14 communication that indicated that this is what's  
15 supposed to be.

16 Q. Do you have any record in your notes of  
17 that phone conversation that might have  
18 occurred?

19 A. Negative.

20 Q. Did the physician's assistant that  
21 conducted the examination on 2-26-07 keep notes  
22 of the history that Mr. Shaw provided?

23 A. Correct.

24 Q. Did the physician's assistant also describe  
25 findings upon physical examination in the notes?

1       **A.** Correct.

2       **Q.** I'll show you what has been marked as P-9.

3       (Brief pause.)

4       **Q.** Doctor, before I get to P-9, if you could  
5 review your record of the physician's  
6 assistant's history and findings? Do you see  
7 that in front of you in the record?

8       **A.** Correct.

9       **Q.** At the bottom it has physician's signature  
10 and there is looks like two signatures, is that  
11 right? Not on P-9 but on your actual treatment  
12 record. Do you have that?

13       **A.** In the end of the whole, yes, the last page  
14 of it.

15       **Q.** Let me show it to you just so we're sure  
16 we're looking at the same thing.

17       **A.** Oh, yes. Correct.

18       **Q.** Do you have that in your record? I'd like  
19 you to refer to it.

20       **A.** Okay.

21       **Q.** Do you see at the bottom it has signatures?

22       **A.** That's correct.

23       **Q.** And whose is the first signature we see?

24       **A.** There's no question the last signature is  
25 mine. I'm going to, I have to make a correction

1 over here to my previous statement as far as the  
2 physician assistant, and I do apologize for  
3 this. I was reviewing many records this  
4 morning. This physician assistant's name is  
5 Jeffrey Hollenback, H-O-L-L-E-N-B-A-C-K.

6 Q. He was a physician's assistant?

7 A. Physician assistant, correct.

8 Q. Employed at Concentra at that time?

9 A. Correct.

10 Q. So when you testified earlier that it was  
11 Shelley that did the examination, you're now  
12 correcting the record?

13 A. That was a mistake.

14 Q. All right. Thank you. You indicated  
15 earlier that your signature appears next to  
16 Mr. Hollenback's signature, is that right?

17 A. Correct.

18 Q. Do you have any recollection as you sit  
19 here today of this physical examination of  
20 Mr. Shaw or the circumstances surrounding it?

21 A. No, my memory is not that current, I'm  
22 sorry.

23 Q. Is there any indication in this notation  
24 that Jeffrey Hollenback had any questions for  
25 you after completing the physical examination of

1 Mr. Shaw?

2 A. Negative.

3 Q. Do you remember as you sit here today  
4 whether Mr. Hollenback asked you for any  
5 direction or advice after completing his  
6 physical examination of Mr. Shaw?

7 A. Negative. I can't say that he has any  
8 questions, but the presence of my signature  
9 indicates that the case was discussed with me.

10 Q. Do you remember what Mr. Hollenback  
11 discussed with you?

12 A. In detail, no.

13 Q. All right. I'm back to P-9 that I handed  
14 to you earlier. Do you have that in front of  
15 you now? Thank you. Do you know whether  
16 Cumberland Truck requested that Concentra  
17 complete this job analysis form as part of its  
18 examination of Mr. Shaw in 2-26-07?

19 A. Correct.

20 Q. Did in fact they ask you to complete this  
21 job analysis form?

22 A. Correct.

23 Q. In February of 2007 did the Concentra  
24 location where you worked at, Mechanicsburg,  
25 have anything on site to have a patient lift

1 something?

2 **A.** Yes, and that was not part of the  
3 examination.

4 **Q.** Did it have anything on site to have a  
5 patient carry some weights so you could  
6 determine how much a patient could carry?

7 **A.** That is correct. That was not part of the  
8 examination.

9 **Q.** Did it have anything on site where a person  
10 could climb stairs so you could analyze and  
11 determine a person's ability to climb stairs?

12 **A.** Correct. That was not part of the  
13 requested examination.

14 **Q.** Did you have anything on site that would  
15 allow the person to push or pull something so  
16 you could analyze their ability to do that  
17 activity?

18 **A.** Same answer, yes, and not part of the  
19 requested examination.

20 **Q.** Did you have anything on site to have a  
21 person control foot controls so you could  
22 analyze how they could do that?

23 **A.** It's not exactly a simulation, but this  
24 part of the examination is the functional  
25 capacity evaluation is available, and again it's

1 not part of the requested examination.

2 Q. Sir, you see some handwriting now on this  
3 P-9, is that correct?

4 A. Correct.

5 Q. Can you tell us whose handwriting that is?

6 A. That's the handwriting of the physician  
7 assistant.

8 Q. And on page 3 there is a block for a  
9 physician's signature. Do you see that?

10 A. That is the third page.

11 Q. Third page, thank you. Can you identify  
12 the signatures in that block, please?

13 A. It's the signature of a physician  
14 assistant, and the second one is my signature.

15 Q. Do you recognize the person who signed the  
16 form?

17 A. That's the signature of Jeffrey Hollenback.

18 Q. Were you -- did you discuss this job  
19 analysis form with Mr. Shaw before he left  
20 Concentra on 2-26-07?

21 A. Negative.

22 Q. Did you review the job analysis form prior  
23 to Mr. Shaw leaving Concentra on 2-26-07?

24 A. The job analysis was reviewed by me, but I  
25 can't say what it is was when Mr. Shaw was still

1 on premises or he left.

2 Q. Was the job analysis completed, meaning the  
3 handwritten parts for Mr. Hollenback, on the  
4 form at the time you reviewed it?

5 A. That is correct.

6 Q. Did you discuss this job analysis form with  
7 Mr. Hollenback before you signed it?

8 A. Yes.

9 Q. Do you know what you discussed with him?

10 A. No, that's not part of the record.

11 Q. You don't remember anything as you sit here  
12 today?

13 A. No recollection.

14 MR. CROCENZI: Can you turn to page 2 of  
15 that job analysis form, please? Your Honor, at  
16 this point I move for the admission of P-9 and  
17 ask that it be published to the jury so they can  
18 follow along in the testimony.

19 THE COURT: All right. Any objection?

20 MS. SALTZ: No objection, Your Honor.

21 THE COURT: It is admitted and it may be  
22 published to the jury.

23 BY MR. CROCENZI:

24 Q. Doctor, at the top there's the category  
25 called standing. Do you see that?

1       **A.** Yes, I have it on screen.

2       **Q.** Are you able to read what Mr. Hollenback  
3 wrote in the standing category?

4       **A.** Most of the things. The standing category  
5 he was able to stand for limited minutes.

6       **Q.** Would you agree that statement is based on  
7 something Mr. Shaw told Mr. Hollenback?

8       **A.** It's usually a combination. The decision  
9 is based on what the patient is telling us about  
10 his or her abilities and the limited physical  
11 examination.

12       **Q.** Under the walking category, can you read  
13 that for us, please?

14       **A.** Able to walk for limited minute intervals.

15       THE COURT: You're referring to limited  
16 minute. It looks to me like a number, 30  
17 minutes.

18       (Brief pause.)

19       THE WITNESS: I have to agree that it might  
20 be a possibility. If you look for it --

21       THE COURT: All right. You're unsure.

22       THE WITNESS: I'm unsure. I'm quite unsure.

23       THE COURT: Thank you.

24       BY MR. CROCENZI:

25       **Q.** Now, the rest of these categories, the



1        comments from Mr. Hollenback, would they be  
2        based on comments or information that Mr. Shaw  
3        provided to him during that examination?

4        **A.** Again it's a combination of physical  
5        examination and statements of the patient.

6        (Brief pause.)

7        **Q.** Let me turn now to the third page. Can you  
8        identify whose handwriting is in the first block  
9        above the signature?

10       **A.** That's the handwriting of the physician  
11       assistant Jeffrey Hollenback.

12       **Q.** Was that handwriting on the form at the  
13       time that you reviewed it?

14       **A.** Yes.

15       **Q.** Are you able to read that for us, please?

16       **A.** "Unable to perform job duties at this time  
17       due to," and I have to say he had difficulties  
18       of, "gait, climbing, and lifting according to  
19       job description."

20       **Q.** You say gait, climb, and lifting?

21       **A.** Yes, the third line is gait, climb, and  
22       lifting. Lift.

23       **Q.** What does -- do you know what  
24       Mr. Hollenback meant by gait?

25       **A.** Ambulation. walking.

1 THE COURT: To me it looks like, "Unable to  
2 perform job duties at this time due to inability  
3 to squat, climb, and lift according to job  
4 description."

5 A. The first word on the third line could be  
6 either gait or squat. I cannot tell.

7 Q. Doctor, is there a notation in your record  
8 about somebody at Concentra speaking with  
9 Cumberland Truck after the exam to let them know  
10 the results?

11 A. That is correct.

12 Q. And just so we're on the same page, here's  
13 my copy. Is that what you have. Can you  
14 recognize that handwriting for us, please?

15 A. Again it's authenticated by the physician  
16 assistant Jeff Hollenback.

17 Q. Does your signature appear anywhere on this  
18 form?

19 A. Negative.

20 Q. And is this a form that's typically  
21 completed by Concentra after exam to note how  
22 examination findings were communicated to the  
23 employer?

24 A. Yeah, we call it a communication sheet in  
25 the sense if there's anything communicated with

1 the company, it may be documented on this form,  
2 correct.

3 THE COURT: Is there an exhibit number on  
4 this?

5 MR. CROCENZI: No, Your Honor, but we can  
6 make, I think it might be part of the  
7 defendant's, but we can --

8 MS. SALTZ: Part of Defendant's Exhibit 4.

9 MR. CROCENZI: I can have him identify it  
10 now. We already did, so --

11 THE COURT: Well, it's a question of whether  
12 or not you intend to introduce it into the  
13 record.

14 MR. CROCENZI: No, I had no intention. I  
15 just wanted to ask a couple more follow-up  
16 questions.

17 THE COURT: Not a problem.

18 BY MR. CROCENZI:

19 Q. Dr. walker, did you contact Cumberland  
20 Truck after the examination of Mr. Shaw on  
21 2-26-07?

22 A. Negative.

23 Q. Turning now to the second page of that job  
24 analysis form, P-9?

25 (Brief pause.)

1 Q. Do you see the category of squatting,  
2 fourth from the bottom?

3 A. Correct.

4 Q. Does that job analysis form indicate how  
5 far an employee at Cumberland Truck,  
6 specifically Mr. Shaw, would have to squat to  
7 do the job as a warehouse worker?

8 A. The check mark is indicating frequently.

9 Q. Does it indicate how far the person needs  
10 to squat down?

11 A. That is correct, it does not.

12 Q. And the one below that, climbing, is there  
13 anything on that form that indicates how much  
14 Mr. Shaw would have to climb, how many steps?

15 A. Negative.

16 Q. And, Dr. Walker, regarding the lifting  
17 category on the first page, does that form  
18 indicate how Mr. Shaw would need to lift,  
19 meaning from the floor, from the waist,  
20 overhead, any of those kind of details?

21 A. Negative.

22 Q. As a medical doctor do you have an opinion  
23 whether it would make a difference if a person  
24 needed to lift something from the floor as  
25 compared to lifting it from a waist high level?

1       **A.** That is correct. That can create a  
2 difference.

3       **Q.** What would be the difference?

4       **A.** Depending on the type of medical problem  
5 that that particular patient has, some would be  
6 able to lift something from the ground zero from  
7 the floor to the certain level and not pass that  
8 particular level, while other patients with  
9 different medical problems, musculoskeletal  
10 problems, would be able to lift only from for  
11 example desk top level higher, but they are not  
12 able to bend down to pick up something from the  
13 floor. So there is a difference between one  
14 condition and another.

15       **Q.** From a medical perspective, however, is it  
16 easier or harder for the human body to lift  
17 something from the floor or from waist height,  
18 if that item weighs the same of course?

19       **A.** For an average healthy individual it's the,  
20 on average it's easier to lift something from  
21 the elevation than from the floor.

22       **Q.** Now, there's a requirement here, carrying,  
23 the second one. Does this form indicate how far  
24 Mr. Shaw would have to carry any item at his  
25 work place?

1       **A.** Negative.

2       **Q.** As a medical doctor do you have an opinion  
3 whether it would make a difference if someone  
4 has to carry something a few feet versus longer  
5 distance?

6       **A.** That's correct. That creates a difference.

7       **Q.** Why is that such a difference, doctor?

8       **A.** The carrying a longer distance is on  
9 average for any individual might be more  
10 difficult than a shorter distance.

11       **Q.** Turning to page 2 again, the fifth one up  
12 is bending. Do you see that?

13       **A.** Correct.

14       **Q.** Does this form --

15       **A.** I'm sorry?

16       **Q.** Bending. Page 2.

17       **A.** Okay. See from below, okay.

18       **Q.** Does that form provide you with any  
19 information about how far Mr. Shaw would have  
20 to bend to pick up anything?

21       **A.** Negative.

22       **Q.** You mentioned earlier in your testimony  
23 that you do have some implements or devices to  
24 measure a person's ability to lift and carry and  
25 so forth. I think you even used the term

1 functional capacity. Do you have the ability to  
2 perform a functional capacity evaluation at your  
3 location in Mechanicsburg?

4 A. If requested, yes.

5 Q. Did you perform any type of functional  
6 capacity evaluation of Mr. Shaw on 2-26-07?

7 A. Negative. Not requested.

8 Q. Did you request of Cumberland Truck that  
9 you be permitted to perform a functional  
10 capacity evaluation of Mr. Shaw?

11 A. Negative.

12 Q. On page 3 of this job analysis did the  
13 physician's assistant indicate any  
14 accommodations for Mr. Shaw?

15 A. There is no indication. There is no  
16 information that would answer directly the  
17 question about what accommodations. There's  
18 only information about inability to perform  
19 certain duties.

20 Q. Thank you. You mentioned earlier in  
21 looking at that flow sheet form that information  
22 was faxed to Cumberland Truck. Would this job  
23 analysis P-9 that you are described for us be  
24 one of those documents that was faxed back to  
25 Cumberland Truck at the conclusion of the

1 examination?

2 A. Could you repeat the question, please?

3 Q. Sure. Was this job analysis form P-9 one  
4 of the documents Concentra faxed to Cumberland  
5 Truck at the conclusion of the examination?

6 A. That's my presumption.

7 Q. Just so I'm clear, before Mr. Shaw left  
8 Concentra in Mechanicsburg did you personally go  
9 over this form with Mr. Shaw before he left?

10 A. No.

11 Q. And after 2-26-07 when Mr. Hollenback had  
12 contacted Cumberland Truck to advise them of the  
13 results, is there any notation in your record  
14 that you spoke with anybody at Cumberland Truck  
15 about the results?

16 A. There is not a commentation of any contact  
17 from 2-26 to 4-05.

18 Q. Thank you. Let's turn to that date because  
19 that's the next time that Mr. Shaw came to  
20 Concentra, is that right?

21 A. That's correct.

22 Q. And did you conduct the physical  
23 examination of Mr. Shaw on this date?

24 A. That is correct.

25 Q. Can you describe for the jury or tell the



1 jury what information you received prior to the  
2 examination with Mr. Shaw on 4-5-07?

3 A. There is a copy of the office notes from  
4 the office of the Appalachian Orthopaedic  
5 Center.

6 Q. Would that be Dr. Oplinger?

7 A. That is correct.

8 Q. Any other information? Let me ask you  
9 this. Did you receive another job analysis  
10 form like you were presented with on --

11 A. Yes, that's correct.

12 Q. Thank you. Dr. Walker, I'm going to show  
13 you the employer's authorization for treatment  
14 for this 4-5-07 examination. Do you have that?

15 A. That is correct.

16 Q. And at the bottom left-hand corner, do you  
17 see that block?

18 A. Bottom left? Yes.

19 Q. Is that something that you completed?

20 A. No. That's the company information  
21 requesting that the reevaluation for fitness  
22 for duty should be performed.

23 Q. Do you know why your name, Dr. Walker, is  
24 listed there and underlined?

25 A. I can only imagine that the employer

1 requested that the examination should be  
2 performed by a physician this time.

3 Q. Thank you. Turning now to your medical  
4 note on 4-5-07, do you have that in front of  
5 you?

6 A. That is correct.

7 Q. Is this your handwriting?

8 A. That is correct.

9 Q. And is this the kind of note that you  
10 typically keep when performing a physical  
11 examination of somebody at Concentra?

12 A. Correct.

13 Q. That was completed on 4-5-07, is that  
14 correct?

15 A. Correct.

16 MR. CROCENZI: Your Honor, again this is a  
17 defendant's exhibit, but I would like to at  
18 least show the jury it at this point. I don't  
19 know if there's going to be an objection. It's  
20 a little unwieldy because both of us were going  
21 to be calling Dr. Walker as a witness, so we're  
22 going back and forth.

23 THE COURT: All right. Any objection?

24 MS. SALTZ: No objection.

25 THE COURT: All right. You may publish it.

1 MR. CROCENZI: Thank you, Ms. Saltz.

2 BY MR. CROCENZI:

3 Q. Doctor, what history did Mr. Shaw provide  
4 to you on that date?

5 A. The record indicates, "Several years of  
6 left knee pain treated by ortho since 10-06 at  
7 steroid injections. Not much help. Continued  
8 working in full capacity until 2-26-07 when he  
9 was directed to Concentra Medical Center for  
10 first return to work physical examination. Not  
11 much change since that visit. Occasionally  
12 takes pain medications. Pain located in the  
13 lateral and medial aspect of the left knee."

14 Q. Okay. Thank you. And did you perform a  
15 physical examination?

16 A. Correct.

17 Q. What did you note as your findings on  
18 physical examination?

19 A. "Present complaint, pain in the left knee.  
20 Physical examination, large frame body,  
21 conscious, oriented, no acute distress. Walks  
22 with cane in the right hand. Musculoskeletal  
23 examination, left hip range of motion within  
24 normal limits without pain. Left knee tender in  
25 lateral and medial area. Range of motion within

1 normal limits with pain on flexion. valgus and  
2 varus tests," it's V-A-R-U-S, "bring pain  
3 without laxity. Patient unable to squat  
4 secondary to pain. Circulation within normal  
5 limits."

6 Q. Did you also have an opportunity to review  
7 those records you received from Dr. Oplinger?

8 A. Correct.

9 Q. Did you make any notation about that  
10 review?

11 A. Correct.

12 Q. What did you say in this note?

13 A. "Diagnosis as per ortho, end stage left  
14 knee arthritis. Records from Dr. Oplinger show  
15 no restrictions being imposed on patient."

16 Q. Did Mr. Shaw give you any statements about  
17 his ability to do his job?

18 A. That is correct. The note indicates,  
19 "Patient claims that his actual duty that he can  
20 perform does not correspond with the provided  
21 job description. (Discussed with the patient)"

22 Q. Now, in this note you made some mention  
23 about what information you would use in  
24 determining Mr. Shaw's ability to work, is  
25 that correct?

1       **A.** That is correct.

2       **Q.** What was your statement concerning that  
3 issue?

4       **A.** Could you rephrase the question, please?

5       **Q.** Sure. What -- did you rely upon Mr. Shaw's  
6 statement or the job analysis form that you  
7 received from Cumberland Truck?

8       **A.** In this particular situation it looks like  
9 I relied on the patient's description and  
10 physical examination. The description of the  
11 job provided by the employer was also taken into  
12 consideration, but since there was obviously a  
13 disagreement about information provided by the  
14 patient and the employer, I inserted this  
15 information in the note.

16       **Q.** And can you read what you wrote after that  
17 parentheses where it says something patient? It  
18 begins with final.

19       **A.** Sure, quote --

20       THE COURT: Excuse me one second. Could you  
21 focus in on that a little bit more, blow it up?  
22 Because I can't see it on the screen.

23       THE WITNESS: Yeah, it's --

24       THE COURT: That's it.

25       MR. CROCENZI: Got it?

1 THE WITNESS: Yeah.

2 THE COURT: That's much better.

3 MR. CROCENZI: Thank you.

4 THE WITNESS: "Final evaluation and decision  
5 is made based solely on job description.  
6 Patient could be employed only with  
7 accommodations as specified. (See physician  
8 comments for details.)"

9 Q. And why did you make the decision that the  
10 final evaluation and decision is made based  
11 solely on the job description?

12 A. The expression job description in this  
13 particular situation pertains to what the  
14 patient is telling me about the job description  
15 provided by the employer. So in fact it's a  
16 combination.

17 Q. Okay, but you say here it's based solely on  
18 the job description, correct?

19 A. That's correct.

20 Q. So it's only one thing that you're relying  
21 upon?

22 A. From a perspective of time I can't right  
23 now say what I mentioned solely job description  
24 provided by employer or job description as  
25 provided by the patient.

1 THE COURT: So in other words it's one or  
2 the other, but you're not sure which.

3 A. That is correct.

4 Q. Doctor, you testified earlier that your  
5 Concentra center performs a lot of physical  
6 examinations. How many do you do per year, do  
7 you know?

8 A. I'm not able to say how many per year.  
9 I can estimate more or less how many per day.

10 Q. Okay.

11 A. Between 8:00 a.m. and 8:00 p.m. we perform  
12 probably I would say between fifteen and twenty  
13 different type physical examinations, plus other  
14 visits, the acute visit, the injuries.

15 Q. And when I mean physical examinations, I  
16 mean somebody that comes in off the street like  
17 Mr. Shaw sent by the employer and they need some  
18 kind of examination, whether it be preemployment  
19 or fitness for duty or something like that.  
20 would your answer change based on that  
21 definition?

22 A. Fitness for duty, maybe one, maybe two per  
23 day. It's what I would call educated guess.

24 Q. How about preemployment physical  
25 examinations?

1       **A.** That's the majority of the physical  
2 examination portion.

3       **Q.** You told us about earlier the fifteen to  
4 twenty per day.

5       **A.** That is correct.

6       **Q.** Do employers typically provide you with a  
7 job description, a written job description when  
8 you are asked to perform your preemployment  
9 physical or fitness for duty physical?

10       **A.** It varies.

11       **Q.** Can you give us a percentage of employers  
12 that provide that kind of information to you?

13       **A.** I would say most employers do not provide  
14 detailed written descriptions of the job.

15       **Q.** Did you contact Cumberland Truck Equipment  
16 Company to get any clarification on this job  
17 analysis they gave you considering Mr. Shaw told  
18 you that he didn't think it was accurate?

19       **A.** There is information that the attempt was  
20 made.

21       **Q.** Is there anything in your record that  
22 indicates that you are received any  
23 clarification? Not that an attempt was made,  
24 but that you actually received clarification  
25 about the job analysis form.



1       **A.** Negative.

2       **Q.** Doctor, did you have a job analysis form  
3 from Cumberland Truck when you examined Mr. Shaw  
4 on 4-5-07?

5       **A.** That is correct.

6       **Q.** I'll show you what has been marked as P-13.  
7 Is that the job analysis form that you completed  
8 on 4-5-07?

9       **A.** That is correct.

10       MR. CROCENZI: Thank you. Your Honor, I  
11 move for the admission of P-13 and ask it that  
12 be published to the jury.

13       THE COURT: Any objection?

14       MS. SALTZ: No objection.

15       THE COURT: It is admitted and it may be  
16 published.

17       (Brief pause.)

18       BY MR. CROCENZI:

19       **Q.** Looking at the first category, lifting,  
20 doctor, can you tell us what you wrote in that  
21 category?

22       **A.** The information is "No problem."

23       **Q.** And can you read what you have under the  
24 carrying category?

25       **A.** "May create problem."

1 Q. Again this is -- is this the same form that  
2 the physician's assistant completed back on  
3 2-24-07? 2-26, sorry, of '07. If you want to  
4 look at them, take your time.

5 A. The form is a form that's the same, the  
6 issues, whether the information inputted by the  
7 employer is the same.

8 Q. That's what I was getting at. The same  
9 information from the --

10 A. Those two paragraphs? It's the same,  
11 that's correct.

12 Q. Okay. So there's still no detail regarding  
13 the job requirements that we went over with that  
14 2-26 job analysis, right?

15 A. That is correct.

16 Q. Can you read what you wrote under the  
17 standing category?

18 A. "Able to stand in one place for five  
19 seconds."

20 Q. Is that something Mr. Shaw told you during  
21 that examination?

22 A. Taking under consideration the comments in  
23 the end of this determination I would say yes.

24 Q. And do you know what did Mr. Shaw explain  
25 to you what happened after five seconds of

1 standing? what did he have to do?

2 A. There is no information on the form  
3 regarding that.

4 Q. And under bending, can you read that for  
5 the jury? Your comment, sorry.

6 A. "Can constitute problem long-term."

7 Q. Again there's no information from  
8 Cumberland Truck on this form about how far  
9 Mr. Shaw would have to bend?

10 A. That is correct.

11 Q. And climbing, can you read that for us,  
12 please?

13 A. "Can perform with difficulty."

14 Q. Again for climbing we don't have any  
15 information, you don't have any information from  
16 Cumberland Truck about how much he would have to  
17 climb?

18 A. That is correct.

19 Q. The same with the squatting, no information  
20 about how far he would have to squat to do his  
21 job?

22 A. Correct.

23 Q. Do you know if Mr. Shaw had any devices  
24 available to him at Cumberland Truck to assist  
25 in his job duties?

1       **A.** Negative.

2       **Q.** This is the last page of the job analysis.

3       Again is that your handwriting?

4       **A.** That is correct.

5       **Q.** This seems fairly easy to read, but just  
6       so there's no confusion can you read your  
7       handwriting in that block where it has --

8       **A.** There's --

9       **Q.** Sure.

10       **A.** "Patient may continue employment with  
11       following accommodation: 1) unable to carry up  
12       to 150 pounds occasionally; 2) unable to carry  
13       up to 75 pounds frequently; 3) unable to stand  
14       in one place longer than five seconds; 4) unable  
15       to bend frequently; 5) unable to squat at all;  
16       6) may have difficulty climbing. Discussed with  
17       patient (he is in agreement). Left message for  
18       Brenda Hoffman," my signature.

19       **Q.** And did you have Mr. Shaw sign this form  
20       indicating that he agreed with everything you  
21       said in this section you read for us?

22       **A.** That's not required.

23       **Q.** But did you do it?

24       **A.** No.

25       **Q.** You indicated that you left a message for

1 Brenda Hoffman. Do you know if you actually  
2 spoke with her at some point about this  
3 examination?

4 A. There's no record of that.

5 Q. Is there any record in your notes that you  
6 have with you today that you discussed this  
7 information that you read for us with Brenda  
8 Hoffman or anybody at Cumberland Truck?

9 A. The records from that particular visit  
10 indicate just that the attempt to contact Brenda  
11 Hoffman was made.

12 Q. Doctor, did you have Mr. Shaw go through  
13 the functional capacity evaluation that was  
14 available at Concentra on 4-5-07?

15 A. No. Those evaluations are not available  
16 on a walk-in basis. It's also important  
17 information.

18 Q. Did you ask Cumberland Truck whether you  
19 could have Mr. Shaw undergo a functional  
20 capacity evaluation at Concentra?

21 A. Negative.

22 Q. And while we're talking about functional  
23 capacity evaluations, can you describe for the  
24 jury what exactly is a functional capacity as  
25 basically what you had on the premises to do it?

1       **A.** The functional capacity evaluation is the  
2       examination done only by specially qualified  
3       physical therapists. The tools for this  
4       examination are present in most of the centers.  
5       The physical therapists who are doing this are  
6       not. It's a set of physical exercises  
7       simulating work environment, pushing, pulling,  
8       carrying, lifting, and so on. It's a very  
9       detailed elaborate and time consuming test that  
10      requires first the, usually you visit to the  
11      work site by that particular physical therapist  
12      to determine what are truly the job  
13      responsibilities and difficulties facing that  
14      particular patient.

15      **Q.** You said it's a long test. How long does  
16      it take?

17      **A.** It varies, but usually it's about one hour,  
18      one hour plus, and that's my truly educated  
19      guess. I don't do it. I don't supervise it.

20      **THE COURT:** Mr. Crocenzi, do you have much  
21      more?

22      **MR. CROCENZI:** No, I have the last exam, the  
23      9-17. I can finish up with that.

24      **THE COURT:** All right. Very good.

25      **BY MR. CROCENZI:**

1 Q. When was the next time that Mr. Shaw came  
2 to Concentra?

3 A. The next visit was 9-17-07.

4 Q. Did you perform that physical examination  
5 on that date?

6 A. That is correct.

7 Q. Do you have the note in front of you from  
8 that examination?

9 A. Correct.

10 Q. I'm showing you the notation from 9-17-07.  
11 Does that match your record that you have with  
12 you today?

13 A. Correct.

14 MR. CROCENZI: Again, Your Honor, this I  
15 believe is a defendant's exhibit, a 9-17-07  
16 office note, I would like to move for its  
17 admission and publish it to the jury while we  
18 have Dr. Walker present.

19 THE COURT: This is also part of Plaintiff's  
20 Exhibit 14?

21 MS. SALTZ: What exhibit?

22 (Brief pause.)

23 MS. SALTZ: I noted I have it also, this  
24 part of the September analysis I discovered out  
25 of Dr. Walker records which is not included as

1 part of my Exhibit D-22, but I would like it to  
2 be.

3 MR. CROCENZI: I have no objection.

4 THE COURT: All right. It is admitted and  
5 it may be published to the jury, but let's have  
6 it marked as Plaintiff's Exhibit 19 as it is  
7 only a portion of a defendant's, or has not been  
8 previously marked and it's not part of the  
9 defendant's exhibits.

10 MR. CROCENZI: Thank you.

11 BY MR. CROCENZI:

12 Q. Can you read your medical history portion,  
13 doctor?

14 A. Quote, "Third return to work evaluation.  
15 No change in the history since 4-5-07. See  
16 prior description. Patient scheduled by ortho  
17 for Synvisc injection. No change in symptoms."

18 Q. Any change in his complaints?

19 A. "Same as 4-5-07."

20 Q. Any change in your findings?

21 A. "No change since 4-5-07. Employment  
22 possible only with accommodations."

23 Q. And again did Cumberland Truck give you  
24 that job analysis form for you to look at on --

25 A. Correct.



1 Q. -- September 17th?

2 A. Correct.

3 Q. Okay. Did you complete that form again?

4 A. Correct.

5 Q. And this is P-14, I'll show it to you, is  
6 that the form that you completed on 9-17?

7 A. That is correct.

8 MR. CROCENZI: I'll move for the admission  
9 of P-14.

10 THE COURT: Any objection?

11 MS. SALTZ: No objection.

12 THE COURT: It is admitted.

13 MR. CROCENZI: May I publish it for the  
14 jury, Your Honor?

15 THE COURT: You may.

16 BY MR. CROCENZI:

17 Q. Looking at the lifting category, what did  
18 you write there, doctor?

19 A. "Lifting, yes (per patient)."

20 Q. What did you mean by yes?

21 A. In the sense he is able to perform the  
22 lifting.

23 Q. And under carrying what did you write?

24 A. "Not for long."

25 Q. And is that something Mr. Shaw told you?

1       **A.** I have to assume that this is the result of  
2       the discussion between me and Mr. Shaw and the  
3       patient and my physical examination.

4       **Q.** And again is there any detail that  
5       Cumberland Truck provided to you about how far  
6       Mr. Shaw would have to carry things?

7       **A.** Negative.

8       **Q.** Under standing, what did you write there?

9       **A.** "Only about five minutes."

10      **Q.** Again is that something Mr. Shaw told you  
11      at that appointment?

12      **A.** There is no information about it. I can  
13      only stipulate that this is a combination of,  
14      yeah, what Mr. Shaw told me, and the results of  
15      my examination.

16      **Q.** And walking, what did you write there?

17      **A.** "Not able to perform frequently."

18      **Q.** And under climbing what did you write?

19      **A.** "Not able."

20      **Q.** And again did you receive any information  
21      from Cumberland Truck about how much Mr. Shaw  
22      would have to climb, how many stairs, how often?

23      **A.** Negative.

24      **Q.** And the last page, is that your signature?

25      **A.** That is correct.

1 Q. And you say what under that in that block  
2 above your signature?

3 A. "Not able to perform all required duties."

4 Q. Is there a reason why you didn't note any  
5 accommodations on this form?

6 A. There's no information about it.

7 Q. What does that mean, doctor? You don't  
8 know?

9 A. I don't know.

10 Q. Okay. Again did you talk to anybody at  
11 Cumberland Truck after the 9-17-07 examination?

12 A. On the page second there is the notation,  
13 "Discussed with Brenda Hoffman."

14 Q. Do you recall whether you and Ms. Hoffman  
15 discussed any kind of accommodations for  
16 Mr. Shaw on that day?

17 A. There is no documentation of any type of  
18 this type.

19 Q. Do you have any memory as you sit here  
20 today that you discussed accommodations with  
21 Ms. Hoffman?

22 A. Negative.

23 Q. Do you have -- do you know whether you  
24 discussed the fact that Mr. Shaw was claiming  
25 that the job description that Cumberland Truck

1 provided was different than what he was doing on  
2 the job? Did you discuss that with Brenda  
3 Hoffman?

4 A. There is no information of this type in the  
5 records.

6 Q. Have you ever toured Warehouse B at  
7 Cumberland Truck's premises in Carlisle?

8 A. I can't say that I have a recollection.  
9 I tour a lot of warehouses, work places, but I  
10 can't say that I toured that particular one.

11 Q. Have you ever seen Mr. Shaw, who is sitting  
12 here today, performing his job at Cumberland  
13 Truck?

14 A. Negative.

15 Q. Did you do a functional capacity evaluation  
16 of Mr. Shaw on 9-17-07?

17 A. Negative.

18 Q. Was 9-17-07 the last time Mr. Shaw was at  
19 Concentra for any purpose?

20 A. The record to my disposition indicated this  
21 is the last encounter.

22 Q. You mentioned that you toured a lot of  
23 warehouses. Do you know how many you toured?

24 A. I would say annually we visit maybe four,  
25 five large employment and small employment

1 sites.

2 Q. And would those include warehouse  
3 positions?

4 A. That is correct.

5 Q. Have you reviewed job descriptions for  
6 warehouse positions during your employment at  
7 Concentra?

8 A. That is correct.

9 Q. Do you have any information about how many  
10 warehouse jobs in general are in central  
11 Pennsylvania, Cumberland County, where you're  
12 located?

13 A. How many warehouse jobs are there?

14 Q. Right. Are they plentiful? Few? What's  
15 your experience?

16 A. In central Pennsylvania I would say not  
17 that many compared with what we hear about other  
18 states and other metropolitan areas.

19 Q. Well, in terms of the job descriptions and  
20 site visits you have done what percentage are  
21 warehouse type jobs?

22 MS. SALTZ: Objection, Your Honor. There's  
23 no foundation that this witness has that  
24 information or where it comes from.

25 THE COURT: Sustained. Plus we're getting a

1 little far afield here.

2 MR. CROCENZI: And I will quit for now.

3 Thanks, Your Honor.

4 THE COURT: All right. Cross examine? Or  
5 examine?

6 CROSS EXAMINATION BY MS. SALTZ:

7 Q. Thank you, Your Honor. Dr. Walker, the  
8 physical, when you're doing a fit for duty  
9 examination, that examination is based on your  
10 medical examination of the patient, what the  
11 patient tells you, and then based on what the  
12 physical requirements of the job are?

13 A. What the patient tells me, plus my physical  
14 examination, plus what the job description gives  
15 me as the information.

16 Q. So when you're looking at a specific  
17 physical requirement for a particular job, those  
18 requirements then are based on what that  
19 condition that the patient may or may not have.  
20 Like let's say for instance Mr. Shaw, Mr. Shaw  
21 has problems with his left knee. So based on  
22 your evaluation of him as to his left knee you  
23 would then look at the physical requirements to  
24 determine if he would be able to perform certain  
25 duties?

1       A. That is correct.

2       Q. Okay. So we're not looking at these  
3 physical requirements in a vacuum. We're not  
4 just looking at them separately and saying can  
5 someone do this or not. It has to be based on a  
6 medical condition.

7       A. That is correct.

8       Q. Okay.

9       MR. CROCENZI: I'm going to place an  
10 objection if we're going to continue with the  
11 leading questions, Your Honor. We can have a  
12 side bar discussion on that if you wish because  
13 I think that's where it's going to continue to  
14 go and I don't want to be continuing to object  
15 every time to a question.

16       THE COURT: I gave you some leeway as well.  
17 I'm going to give Ms. Saltz some leeway in order  
18 to expedite this. To the extent that it gets to  
19 an issue that bears directly on liability or  
20 damages we'll hear from you I'm sure,  
21 Mr. Crocenzi.

22       MR. CROCENZI: Okay. Thank you, Your Honor,  
23 I appreciate it.

24       BY MS. SALTZ:

25       Q. Thank you, Your Honor. Now, when you

1 perform a fit for duty examination, or a  
2 physical assistant, what is it, the PA? AP,  
3 your practitioner?

4 A. A PA, physician assistant.

5 Q. A physician assistant, I got a little  
6 tongue tied there. When you, when that's  
7 performed do you begin with the medical  
8 evaluation first? Well, tell me, how does it  
9 work? I come in for a fit for duty exam, I bring  
10 my form. What do you do?

11 A. First is the history taking, i.e.  
12 discussion.

13 Q. Okay. Followed by?

14 A. Physical examination.

15 Q. Followed by?

16 A. The decision making.

17 Q. Completing the form?

18 A. That is correct.

19 Q. Now, is this form completed when the  
20 patient is still there, the physical  
21 requirements form?

22 A. The history. The documentation in a sense,  
23 filling out of the paperwork may be completed  
24 when the patient is still on premises or maybe  
25 completed later.



1 Q. Okay. Now, I would like -- when you  
2 testified that you could, on one of the  
3 examinations you did not reach Ms. Hoffman, do  
4 you usually leave a voice mail message?

5 A. Oh, yes. I mean, most of the time yes.

6 Q. So it's a very detailed message?

7 A. It varies from case to case.

8 Q. Doctor, I'd like to take you through these  
9 examinations, and I'll try to move very quickly  
10 through them. Would you look at the September,  
11 I'm sorry, the February 26th examination? This  
12 is my first time working ELMO, so I'm going to  
13 see how I do with this. Oh, yes, it's  
14 Plaintiff's Exhibit 9 and it's Defendant's  
15 Exhibit 4. All right, so in this instance with  
16 Mr. Shaw, and I should begin with the medical  
17 evaluation, if you could turn to the section  
18 that deals with examination?

19 A. Correct.

20 Q. That's page 4, let's start there, and based  
21 on this examination without reading it line by  
22 line could you just summarize for the jury what  
23 was the medical history, present complaint, and  
24 the findings?

25 A. In the sense the note indicates, "Patient

1 here for evaluation of performance of work  
2 duties, works 8 hours, 8-hour shifts, forklift  
3 operator." Then there is a medical history. Do  
4 you want me to --

5 Q. Just summarize without reading it verbatim.  
6 You can just summarize it for us.

7 A. Short summary, there's a history of the  
8 problem with the knee, and it was treated by an  
9 orthopaedic specialist. There are medications  
10 listed that basically just of that, and there is  
11 pain in the left knee. That's the short version  
12 of this.

13 Q. Could you tell me what were the current  
14 medications at that time?

15 A. Lasix, Lisinopril, Wellbutrin, Lipitor,  
16 Gabapentin, and Lodine.

17 Q. Are any of the medications that you just  
18 mentioned painkillers or pain medicine?

19 A. Lodine.

20 Q. Lodine?

21 A. And Gabapentin is used for chronic pain  
22 management, too.

23 Q. Okay. With regard to these medications is  
24 there, are they like with any other painkillers  
25 that you're not supposed to be operating

1 machinery or driving under the influence? Do  
2 they have that there?

3 A. I can't answer clearly yes or no because  
4 any medication can cause side effects like  
5 drowsiness that would create a problem for a  
6 worker to operate "dangerous machinery". That  
7 particular case if there was any side effect of  
8 that particular nature reported, despite the  
9 fact that it's not reported in the literature,  
10 if the patient is dizzy or drowsy on that  
11 particular medication, yes, that might be a  
12 contraindication.

13 Q. Now, with regard to the present complaints,  
14 at that time there was complaint of pain in the  
15 left knee and swelling of the both lower legs,  
16 is that correct?

17 A. Yes, there was some, yes. That is correct.

18 Q. And what were the findings on examination,  
19 doctor? Again just summarize them.

20 A. Yes, to summarize, limitation of range of  
21 motion of the left knee, edema, swelling on both  
22 lower extremities. That's the core of them.

23 Q. Okay. Now, having identified the medical  
24 condition, and you signed off on this. You have  
25 reviewed it at one point in time?

1       **A.** That is correct.

2       **Q.** Okay. Now, having performed the medical  
3 examination can we now go to the physical  
4 requirements of the job based on the medical  
5 condition?

6       **A.** Could you please repeat the question?

7       **Q.** Sure. You've done the medical exam. Now  
8 you have to complete the physical requirements,  
9 whether this employee could do specific things.

10       **A.** Correct.

11       **Q.** And that's based on the medical, based on  
12 your observation or the physician assistant's  
13 observation and what the patient tells you?

14       **A.** Correct.

15       **Q.** Okay. Now, we can go through the physical  
16 requirements as noted here. So as far as  
17 lifting goes, Mr. Shaw was not able to perform  
18 that, correct?

19       **A.** Correct.

20       **Q.** And that's not because he didn't have the  
21 upper body capacity to lift, but it's because  
22 the condition involved his legs and knees, is  
23 that correct, doctor?

24       **MR. CROCENZI:** Objection, Your Honor.  
25 Leading. We're getting into that liability

1 issue.

2 MS. SALTZ: I'll withdraw it, I'll ask an  
3 open direct question.

4 THE COURT: Very well. Objection is  
5 sustained.

6 BY MS. SALTZ:

7 Q. Doctor, with regard to lifting, why was  
8 Mr. Shaw found based on the medical examination  
9 observation unable to lift?

10 MR. CROCENZI: Again objection. I'm going  
11 to object at this point because Dr. Walker has  
12 said he didn't do the physical examination, and  
13 I'm not sure --

14 THE COURT: Well, the objection then is to  
15 the foundation of the question.

16 MR. CROCENZI: To the foundation, because my  
17 recollection -- well, first of all I'm clear  
18 that Dr. Walker testified he didn't do the  
19 physical examination and I believe he testified  
20 that he wasn't sure whether he actually  
21 discussed the physical examination with the  
22 physician assistant.

23 THE COURT: All right. The objection is  
24 sustained. If you want to lay a foundation we  
25 could go a little further with this.

1 MS. SALTZ: I will, Your Honor. Thank you.

2 BY MS. SALTZ:

3 Q. Doctor, if you turn to the third page of  
4 that physical job analysis, your signature  
5 appears on that page?

6 A. That is correct.

7 Q. And what is the purpose of your signature  
8 appearing there since you did not perform this  
9 examination?

10 A. In most of the cases in a situation like  
11 this, in a situation where my signature is not  
12 required the presence of my signature suggests,  
13 indicates a reminder that this case was  
14 presented to me by a physician assistant.

15 Q. And when you say presented to you by the  
16 physician assistant, could you explain what is  
17 meant by that, what happens when a physician  
18 assistant comes to you and presents a case?

19 A. He tells me the history, findings, he tells  
20 me what were the physical examination findings  
21 and what was his or her decision regarding the  
22 performance of the duties.

23 Q. And then you sign off on that or if you  
24 disagree would he change it?

25 A. If I would disagree, if I would disagree I

1 would most likely -- it depends. It depends  
2 from situation to situation. I would either  
3 send the physician assistant to gather  
4 additional information if this would be a  
5 significant discrepancy or I would do the  
6 examination myself.

7 Q. So the fact that you signed the February  
8 26th, 2007 evaluation, is that an indication  
9 that you not only discussed the case with the  
10 physician assistant but concurred in the  
11 findings?

12 MR. CROCENZI: Objection, leading. He  
13 already testified --

14 THE COURT: One second.

15 (Brief pause.)

16 THE COURT: Overruled. You may answer.

17 A. As I indicated before I have not performed  
18 this physical examination.

19 Q. But did you concur in the findings of this  
20 examination? Did you agree with the physician  
21 assistant?

22 A. I accepted the findings. I can't concur  
23 with the physical findings since I have not seen  
24 the patient.

25 Q. Fair enough. Let me ask you this question.

1 Based on the medical examination as performed  
2 and as you testified to why would the physician  
3 assistant find that Mr. Shaw was unable to lift?

4 MR. CROCENZI: Objection, Your Honor. He's  
5 testified he can't answer those questions  
6 because he wasn't, he can't concur with the  
7 physician assistant's physical findings.

8 Q. I'll withdraw the question, Your Honor,  
9 I'll try to get -- someone with a condition as  
10 appearing on February 26th, 2007 as Mr. Shaw  
11 did, pain in the left knee with the swelling in  
12 both legs, again not physical, I'm not talking  
13 about upper body ability, I'm talking about  
14 below the waist, we talked about a left knee  
15 problem and we talked about with leg swelling,  
16 would somebody be able to lift 150 pounds  
17 occasionally if they -- strike that. Let me go  
18 back over some of the other information. Based  
19 on this evaluation, we have an individual here  
20 who is unable to squat and has a very difficult  
21 time bending, would they be able to lift 150  
22 pounds?

23 MR. CROCENZI: Objection. Is this a  
24 hypothetical, because --

25 MS. SALTZ: This is a hypothetical.



1 MR. CROCENZI: Because, Your Honor, again  
2 the doctor has already testified he cannot  
3 concur with the physical examination findings of  
4 the physician assistant, so I'm going to object  
5 because she can't get the testimony she wants  
6 because of Dr. Walker's testimony.

7 MS. SALTZ: Could we have a side bar if  
8 we're going to have a lengthy discussion?

9 THE COURT: Well, all right. Yeah, it's a  
10 bit of a speaking objection, but I understand  
11 what Mr. Crocenzi is saying. The objection  
12 really I would think goes more to relevance  
13 because the question isn't would any individual  
14 with these conditions be able to lift 150  
15 pounds, it's really whether Mr. Shaw could.

16 MS. SALTZ: And that's what I'm trying to  
17 get to, Your Honor, is the fact that based on  
18 Mr. Shaw's medical condition as found in the  
19 examination that these questions can then be  
20 answered.

21 THE COURT: Well, I think what Mr. Crocenzi  
22 is objecting to is whether the doctor can in  
23 fact make that evaluation based upon what is  
24 contained in the record, but first let's find  
25 out if he can make that evaluation and then

1 secondly, if he can, what that assessment is.  
2 Do you understand, doctor? Are you able to  
3 respond to counsel's questions based solely upon  
4 what you read in the record because you did not  
5 perform the physical examination?

6 THE WITNESS: The answer would be over here  
7 I can't answer in detail because I have not  
8 performed this examination.

9 THE COURT: All right.

10 MS. SALTZ: But yet, doctor, you agree that  
11 by signing off that he was unable to perform the  
12 duties of squatting, climbing, and lifting?

13 MR. CROCENZI: Objection. I thought we just  
14 went through this.

15 THE COURT: Sustained.

16 BY MS. SALTZ:

17 Q. One last question, doctor, just to clarify  
18 for myself. This was the information that was  
19 provided to the company based on Concentra's  
20 examination of this individual for that February  
21 26th exam?

22 A. I'm sorry, was the question whether this  
23 was the information was provided the company?

24 Q. Yes.

25 A. Yes.

1 Q. Doctor, what's an -- why would you use an  
2 FCE? When would you use an FCE?

3 THE COURT: By that you mean functional  
4 capacity --

5 Q. Functional capacity evaluation. Under what  
6 circumstances?

7 A. The FCE is usually requested either by  
8 attorneys or insurance companies for  
9 determination of -- the name of the test is  
10 saying fitness for duty. Whether the patient  
11 truly can or cannot perform certain activities.

12 Q. So it's not something usually requested by  
13 an employer?

14 A. To my understanding in the state of  
15 Pennsylvania an employee cannot request it.

16 Q. But I'm asking you based on what goes on at  
17 Concentra is it something you find often  
18 requested by employers?

19 A. It's requested usually by insurance  
20 companies to my knowledge, but again I don't  
21 take those requests, so I can't give you the  
22 hundred percent accurate answer to this  
23 question.

24 Q. All right. Let's look at what has been,  
25 let's look at your April, the exam that you

1 actually did perform in this case, the April  
2 5th, 2007. Are you with me?

3 A. Yes, correct.

4 Q. And that is Defendant's Exhibit 14. Now,  
5 doctor, you read the examination portion of, I  
6 will not belabor that with you, but in this one  
7 you had, Mr. Shaw disagreed with some of the job  
8 descriptions or some of the physical  
9 requirements of his job as you testified?

10 A. That is correct.

11 Q. So you did take, did you take -- I believe  
12 you testified you took into account what  
13 Mr. Shaw told you, what the physical  
14 requirements of the job were, your own  
15 observations, and your own examination, correct?

16 A. Correct.

17 Q. Thank you, and based on all of that you  
18 determined that looking at the third page that  
19 Mr. Shaw could continue in his employment with  
20 the following accommodations, and those  
21 accommodations were that as long as he did not  
22 have to carry up to 150 pounds occasionally, he  
23 didn't have to carry up to 75 pounds frequently,  
24 didn't have to stand in one place longer than  
25 five seconds, didn't have to bend frequently,

1 and he didn't have to squat at all, and then he  
2 may have difficulty climbing, then he could do  
3 his job?

4 A. That is correct.

5 Q. And that's what Mr. Shaw, you went over  
6 this with Mr. Shaw because obviously he had to  
7 agree with you or disagree?

8 A. That is correct.

9 MS. SALTZ: I move for the admission of  
10 D-14, Your Honor.

11 THE COURT: I think it is admitted, but if  
12 it's not is there any objection?

13 MR. CROCENZI: No. No objection.

14 MS. SALTZ: As a housekeeping matter I don't  
15 know if D-4, whether that's Plaintiff's 9.

16 THE COURT: First D-14 is admitted, and  
17 then with respect to Defendant's 4, my  
18 understanding was that P-9 was in fact admitted.  
19 Ms. McKinney, is P-9 admitted?

20 COURTROOM DEPUTY: P-9 is admitted, Your  
21 Honor.

22 THE COURT: And that is not identical to --

23 MS. SALTZ: D-4.

24 THE COURT: -- D-4. D-4 contains some  
25 additional information.

1 MS. SALTZ: Correct, Your Honor. I would  
2 move --

3 THE COURT: And I don't know that we have  
4 addressed the last two pages. We have addressed  
5 the next to last page, but we have not addressed  
6 the last page I don't believe of D-4, am I  
7 correct?

8 MR. CROCENZI: That's right, Your Honor.  
9 I asked Dr. Walker, but I did not move for the  
10 admission of that particular page.

11 THE COURT: All right. Any objection to the  
12 admission of D-4?

13 MR. CROCENZI: No.

14 THE COURT: It is admitted.

15 MS. SALTZ: Thank you, Your Honor.

16 BY MS. SALTZ:

17 Q. All right, Dr. Walker, I won't keep you  
18 much longer. Let's take a look at the September  
19 17th --

20 A. Okay.

21 Q. Are you there? Okay. And this is an exam  
22 that you performed yourself independently?

23 A. Correct.

24 Q. And based on that exam and discussions I  
25 take it with Mr. Shaw again during that exam --

1       **A.** Correct.

2       **Q.** -- you determined that as of September  
3       17th, 2007 that Mr. Shaw was not able to perform  
4       all required duties, is that correct?

5       **A.** Correct.

6       **Q.** And the required duties that he was not  
7       able to perform at that time consisted of only  
8       able to stand for five minutes, not able to walk  
9       frequently, not able to squat at all, not able  
10      to climb at all, and at this point only  
11      occasionally operate a forklift, is that  
12      correct? Looking at the second page, look at  
13      your --

14      **A.** Okay. Okay.

15      **Q.** Look at the second page.

16      **A.** Could you repeat the question?

17      **Q.** Sure. You determined that he is not able  
18      to perform all the required duties, correct?

19      **A.** Correct.

20      **Q.** And those required duties appear on the  
21      second page?

22      **A.** Correct.

23      **Q.** And the ones that I've just gone through?

24      **A.** That's correct.

25      MS. SALTZ: I have no further questions,

1 Your Honor. Oh, and I move for the admission of  
2 D-22 if that hasn't been admitted.

3 THE COURT: I recognize there may be some  
4 overlap here. Any objection to D-22.

5 MR. CROCENZI: That's the 9-17-07? No.

6 THE COURT: D-22 is admitted.

7 REDIRECT BY MR. CROCENZI:

8 Q. Just a couple of follow-up questions.  
9 Dr. Walker, do you also do preemployment  
10 physical examinations for employees at  
11 Cumberland Truck? You meaning Concentra, Sorry.

12 MS. SALTZ: Objection, Your Honor, that's  
13 outside the scope of my cross.

14 THE COURT: Overruled.

15 A. I can't answer yes and no. Explanation,  
16 I don't have in front of me the detailed  
17 information about that particular company.  
18 What's happening is it's almost like a  
19 smorgasbord. Some companies are sending their  
20 employees to our center only for treatment of  
21 acute injury, somebody injured himself and then  
22 they are coming over here, I mean to Concentra,  
23 but they are not sending to us preemployment  
24 physical examination. They are sending them  
25 somewhere else. Other employers are sending



1 preemployment physical examination but they are  
2 not sending acute injuries, so I can't tell you  
3 right now what's the schedule for that  
4 particular company.

5 MR. CROCENZI: No further questions.

6 THE COURT: All right. I have no questions,  
7 doctor. Thank you very much. You may step  
8 down. And may the doctor be excused?

9 MR. CROCENZI: Before, I know you'd like to  
10 have exhibits admitted before, while the witness  
11 is on the stand. We're moving for the admission  
12 of P-8. That's the flow sheet that Dr. Walker  
13 identified. If I haven't done so already I'll  
14 move for it now.

15 THE COURT: All right. Any objection?

16 MS. SALTZ: No objection.

17 THE COURT: All right. P-8 is admitted.

18 MR. CROCENZI: Thanks, Your Honor.

19 THE COURT: Thank you very much, doctor.  
20 You may be excused.

21 THE WITNESS: Thank you.

22 THE COURT: Ladies and gentlemen, we'll take  
23 our morning recess at this time. Please recall  
24 all of my earlier instructions and refrain from  
25 any conversations among yourselves about what

1 you have seen and heard so far. We're in recess  
2 until 11:35. Ms. McKinney, you may escort the  
3 jury.

4 (Recess taken from 11:17 to 11:37 a.m.)

5 THE COURT: Please be seated. Mr. Shaw, I  
6 remind you that you're still under oath.

7 THE WITNESS: Yes, sir.

8 THE COURT: And I think we're at cross  
9 examination. So, Ms. Saltz, if you would,  
10 please?

11 CROSS EXAMINATION BY MS. SALTZ:

12 Q. Good morning, Mr. Shaw.

13 A. Good morning.

14 Q. And, Mr. Shaw, I would like to focus you  
15 right now to the period from the time you were  
16 hired in 2000 up to late 2006. Okay? Before we  
17 get into late 2006, early 2007, okay?

18 A. Yes, ma'am.

19 Q. When you were hired your position was  
20 warehouse worker, correct?

21 A. That is correct.

22 Q. And that title never changed?

23 A. Never changed.

24 Q. At any time?

25 A. No, it did not.

1 Q. So the fact that you were testifying  
2 yesterday about this leading receiver position  
3 or primary receiver, that wasn't an official  
4 title?

5 A. No, it was not an official title.

6 Q. That was just part of your job duties?

7 A. Yes, ma'am.

8 Q. And when you interviewed with Mr. Kline and  
9 he told you that the warehouse job was hard  
10 work, correct?

11 A. Yes.

12 Q. And you would agree that dealing with heavy  
13 truck parts was hard work?

14 A. Yes.

15 Q. Now, at some point in time you were even  
16 able to lift up to 140 plus pounds of a brake  
17 drum and take it from one pallet and toss it  
18 onto another?

19 A. Yes.

20 Q. And it took eight hours of standing,  
21 walking, climbing, reaching, bending, squatting  
22 to do that job?

23 A. Eight hours plus.

24 Q. Eight hours plus.

25 A. Many hours overtime.

1 Q. Well, that's good, too.

2 A. Yes, it was.

3 Q. And you were able to do all of those  
4 physical requirements?

5 A. Yes.

6 Q. And I'm going to hand you what has been  
7 admitted as Plaintiff's Exhibit 6, and that's  
8 the list of the assigned duties?

9 A. Yes, it is.

10 Q. So pulling customer orders, that's pulling  
11 them off the shelves?

12 A. Yes.

13 Q. And that can be done, in some instances it  
14 has to be done physically, taking the order off  
15 the shelf?

16 A. Well, you pull each individual item off the  
17 shelf to make up the customer order.

18 Q. And some of those items are on the second  
19 floor, which you'd have to go up a staircase to  
20 get, and some of them are on the first floor?

21 A. Yes.

22 Q. And some of the aisles are very small as  
23 compared to some aisles being bigger in the  
24 warehouse?

25 A. Not in our warehouse, not in the big

1 warehouse.

2 Q. Now --

3 A. They were, all the aisles were very wide.

4 Q. Okay, so you could use a forklift on the  
5 first level in every single aisle?

6 A. No.

7 Q. No? Okay. So there were some aisles you  
8 couldn't put the forklift through?

9 A. Correct.

10 Q. Okay, and you certainly couldn't use it on  
11 the second floor?

12 A. No, you could not.

13 Q. So in order to get stock from the second  
14 floor you'd have to go up a set of steps?

15 A. Yes.

16 Q. In fact, I was at the warehouse, there's  
17 two sets of steps there.

18 A. Yes.

19 Q. There's a lot of steps.

20 A. 22.

21 Q. You counted them?

22 A. Every day.

23 Q. I probably would have, too. All right, so  
24 that's what's pulling orders means?

25 A. Yes.

1 Q. Load and unload delivery trucks, and I was  
2 trying to get a good concept in my mind as to  
3 what was meant by loading and unloading. Now,  
4 did you always have to use a forklift to unload  
5 a truck?

6 A. No, you didn't. You could run it on a hand  
7 jack, slide it under the skid, jack it up, and  
8 pull it off.

9 Q. Okay, and sometimes physically you would  
10 have to take the product off the truck and put  
11 it on a skid or a pallet?

12 A. Yes, you would.

13 Q. And trucks would come in there on the  
14 average about maybe two, three, four times a  
15 day?

16 A. Twelve, eighteen, twenty times a day.

17 Q. Every day?

18 A. Some days. Some days we had as little as  
19 four or five.

20 Q. So some days four or five, some days more?

21 A. Yes.

22 Q. And isn't it true, sir, that when the  
23 trucks would come in some of the product that  
24 would be unloaded from that truck would have to  
25 be put up onto the second floor, like air bags?

1       **A.** Yes.

2       **Q.** And some of it would be on the first floor?

3       **A.** Yes.

4       **Q.** So if you would unload that truck you'd  
5 take that product with either a hand truck or a  
6 forklift, bring it into the warehouse, and then  
7 physically you'd have to lift it up off of there  
8 and carry it up the steps?

9       **A.** No.

10      **Q.** Well, how did you get it upstairs?

11      **A.** There was a eight foot wide gate at the  
12 edge of the second, at the edge of the second  
13 floor. The mezzanine is what we called it.  
14 They would open the gate, we would lift the skid  
15 up with the forklift and set it on the second  
16 floor. Then you'd have to take a hand jack and  
17 slide under the skid to pull it away from the  
18 edge so you could put up another one.

19      **Q.** Okay, and then how would you get it up on  
20 the shelves then?

21      **A.** Pardon?

22      **Q.** How would you get it up on the shelves the  
23 product?

24      **A.** Each individually unbox it and put them on  
25 the shelf or in the bin.

1 Q. And that would be physically you would be  
2 doing that?

3 A. Yes, you would.

4 Q. You wouldn't be using any kind of truck or  
5 anything?

6 A. You'd be using a hand cart.

7 Q. To put them up on the shelf?

8 A. No, to transport -- when you unbox it, take  
9 them out of the big crates, put it on a hand  
10 truck as you're checking it in, and then roll  
11 the hand cart to the shelf and then physically  
12 put it from the cart to the shelf.

13 Q. Okay, and how high would that cart be off  
14 the ground?

15 A. About three feet.

16 Q. So about that much?

17 A. Yeah, about that.

18 Q. So you'd have to bend down, squat down,  
19 bend down, pick it up, and put it on the shelf?

20 A. Yes.

21 Q. And how high were the shelves up on that  
22 second level?

23 A. Shelves were about six foot four maybe.

24 Q. Okay, and that would be easy for you then  
25 to reach the higher ones?



1       **A.** It was.

2       **Q.** Now, would the same thing work on the first  
3 level that once the product got in, it was  
4 checked in, you would take it over to the shelf  
5 where it belonged, and again you'd have to  
6 physically put the product up on the shelf?

7       **A.** Yes. In the shorter section of the  
8 warehouse underneath the mezzanine.

9       **Q.** So that's where the bending and the  
10 squatting comes in, and the lifting?

11       **A.** Yes.

12       **Q.** And that product could weigh as little as a  
13 pound to as much as two hundred pounds?

14       **A.** No, stuff was -- upstairs and underneath  
15 the mezzanine probably wouldn't weight any more  
16 than fifty pounds.

17       **Q.** Okay. What about on the first level?

18       **A.** It wasn't very heavy stuff.

19       **Q.** So there was no way this was a sit down  
20 job. This was a job you were constantly on the  
21 move, going, going, going?

22       **A.** Yes.

23       **Q.** Busy warehouse?

24       **A.** Yes.

25       **Q.** Now, at that time before 2006 there was

1 nothing you couldn't do, is that correct?

2 A. I'm sorry, say again?

3 Q. You could do, you climbed stairs, you went  
4 up the steps when you needed to, you put stuff  
5 on shelves, you bent down to pick stuff off the  
6 cart?

7 A. Yes.

8 Q. No problems?

9 A. No problems.

10 Q. Now, all warehouse workers, including  
11 Mr. Kline as a supervisor, had to do all of  
12 these things?

13 A. Tim Kline had to do rather less of it. He  
14 did have some office duties and other stuff to  
15 do.

16 Q. But he still had to pull orders, had to  
17 unload trucks?

18 A. When we needed him, yes.

19 Q. And then accurately checking in stock  
20 orders from branch and vendors, how would that  
21 be accomplished?

22 A. You look at each individual item or each  
23 stack of similar items, count them, make sure  
24 that the number of items on the skid or in the  
25 box is the same number that's on the invoice you

1 have in your hand.

2 Q. So you have the invoice in your hand,  
3 that's either on a skid or a pallet or whatever?

4 A. Yes.

5 Q. And then you got to bend down and make sure  
6 everything coincides with the skid?

7 A. You don't have to -- you don't have to --  
8 you do not have to bend down, stand there and  
9 count similar items. There's four cases here,  
10 four cases there, that's sixteen. Sixteen times  
11 four is sixty something, whatever it is, and  
12 then each individual, then you go the number of  
13 gallons. You don't have to bend down to look at  
14 each individual box.

15 Q. Okay, so fair enough. But you're not  
16 sitting down doing this, you're standing.

17 A. You can sit down or you can stand. I mean,  
18 it's there, you're here, you sit down, you stand  
19 up, it doesn't matter.

20 Q. Now, if you look on this description, again  
21 I'm going down just this list, all right? Fill  
22 and maintain stock shelves. What do we mean by  
23 fill and maintain stock shelves?

24 A. Many items would come in in loose boxes.

25 Q. Okay.

1       **A.** Okay? There's a big coffin box full of  
2 exhaust parts, and you, after you checked them  
3 in you'd have to take them out of the coffin  
4 box, out of the big box and go and put them on  
5 the proper shelf in the proper area.

6       **Q.** That coffin box thing, I don't know, did  
7 somebody come up with that name, sir, or is that  
8 just we just refer to a box being --

9       **A.** That's any warehouse, any box big enough  
10 for a person to get into is a coffin box.

11       **Q.** Okay, that's where they'd be all loose and  
12 you'd have to take them out of there?

13       **A.** Yes.

14       **Q.** You'd have to count them as well?

15       **A.** Yes, you have to count them. They would  
16 come in in mixed parts, you know? Half a dozen  
17 of these, a dozen of these, ten of these, one of  
18 this, and it's all on the invoice and it's all  
19 under loose.

20       **Q.** Okay, when it's loose like that, just out  
21 of curiosity did you have to organize them into  
22 groupings?

23       **A.** Yes.

24       **Q.** And then those grouping would then be put  
25 on the shelves?

1       **A.** Yes.

2       **Q.** How did you get them to the shelves?

3       **A.** Again on carts.

4       **Q.** Just like on a flatbed type of cart?

5       **A.** A flatbed type of cart or the three foot  
6 high ones, whichever one we had available.

7       **Q.** Deliver parts as required using the company  
8 vehicle. That happened sometimes?

9       **A.** That happened to me one time.

10       **Q.** Operating the forklift. How many forklifts  
11 were there at that time?

12       **A.** Initially there were three forklifts and a  
13 standup order picker. Later on we added a  
14 couple of more. Then we replaced some. When I  
15 left we only had two forklifts and one man-up.  
16 That means the entire box, operator's box went  
17 up, and then we had a side, side shifting, we  
18 had about four, five forklifts and a man-up. We  
19 had more.

20       **Q.** Housekeeping duties.

21       **A.** Keeping broken pieces of skid off the  
22 floor. Keeping the plastic wrap from blowing  
23 around in the breeze that we cut off a skid.  
24 Sweeping up the excess dirt.

25       **Q.** So you had to go around and pick up stuff

1 off the warehouse floor?

2 A. Yes, or as you opened up a skid to make  
3 sure all the scrap is away from that and go  
4 throw it away.

5 Q. So you're walking around, you're bending,  
6 picking stuff up, squatting down, whatever,  
7 right?

8 A. Any action necessary to do the job, yes.

9 Q. So it was a really physical job.

10 A. Yes, it was.

11 Q. Now, you also testified yesterday with  
12 regard to a work accident you had early on in  
13 your career with CTE.

14 A. Yes.

15 Q. And you had to go out on a medical leave  
16 for that, right.

17 A. Yes, I did.

18 Q. And you were out for about three months?

19 A. Yes.

20 Q. And before you could return to work you  
21 needed a doctor's release to return to work?

22 A. I needed two doctor's releases to get back  
23 to work.

24 Q. And you got those and brought them back?

25 A. Yes.

1 Q. But you weren't full duty when you came  
2 back, were you?

3 A. Yes, I was.

4 Q. Well, meaning full-time, but were you  
5 doing, I mean you jumped immediately into doing  
6 full duty?

7 A. Yes, I did.

8 Q. So you had no light duty then in the  
9 beginning, just to ease you --

10 A. Not after the doctors released me.

11 Q. Okay.

12 A. I had light duty earlier in the treatment  
13 when the doctors were not treating me with the  
14 proper problem that I had.

15 Q. And during that period of time --

16 THE COURT: Excuse me one second. I'm sorry  
17 to interrupt both of you, but, Mr. Shaw, if you  
18 would just wait until Ms. Saltz completes her  
19 question before you answer, because the court  
20 reporter can't take down both of you speaking at  
21 the same time. I know you're anticipating her  
22 question, and this happens frequently. I'm not  
23 picking on you.

24 THE WITNESS: Yes, sir.

25 THE COURT: But please pause after she

1 finishes her question and you begin your answer,  
2 and obviously, Ms. Saltz, the same. Thank you.

3 THE WITNESS: Yes, sir, I'll try.

4 BY MS. SALTZ:

5 Q. And during that period of time the company  
6 stood behind you, didn't they?

7 A. Yes.

8 Q. And you went out on medical leave, you had  
9 to go out on medical leave, right?

10 A. Yes, I did.

11 Q. And there's nothing wrong with going out on  
12 that medical leave, was there?

13 A. No.

14 Q. Now, you've had knee pain on and off since  
15 about 1986?

16 A. It started in 1986, yes.

17 Q. Now, you never told anybody at the company  
18 that you had knee pain.

19 A. Is that a question or a statement?

20 Q. That's a question, that's a statement, you  
21 never did, right?

22 A. Yes, I told Tim, my supervisor, my knee  
23 hurt occasionally.

24 Q. Okay. Other than Tim did you ever go to  
25 Brenda, tell her that you had knee pain? Bryan?



1       **A.** It wasn't necessary to tell them that I had  
2 knee pain.

3       **Q.** Chuck? Pat?

4       **A.** It was not necessary to tell them that I  
5 had any kind of knee pain.

6       **Q.** Okay, and you also never asked any of them  
7 for any kinds of accommodations, right?

8       **MR. CROCENZI:** Objection, Your Honor, as to  
9 time frame. Is this when the worker's comp  
10 injury happened early on or is this throughout  
11 his employment?

12       **MS. SALTZ:** We're moving through gradual  
13 employment, Your Honor.

14       **THE COURT:** All right. Would you rephrase?

15       **MS. SALTZ:** Excuse me?

16       **THE COURT:** Would you rephrase? Please  
17 rephrase your question.

18       **BY MS. SALTZ:**

19       **Q.** During -- put aside the work, we're done  
20 with the work injury.

21       **A.** Okay.

22       **Q.** We're moving forward now, after 2000,  
23 you're working your job.

24       **A.** Yes, ma'am.

25       **Q.** And during that period of time you never

1 said anything other than to Tim about any kind  
2 of knee pain and you never said anything about  
3 any kind of accommodations, right?

4 A. No, ma'am, I did not.

5 Q. You also had back problems, didn't you?

6 A. Occasionally, yes.

7 Q. You never told anybody at CTE about that?

8 A. There was no need.

9 Q. Now, before your exam with Concentra on  
10 February 26th, 2007 you don't know if anybody at  
11 that company considered you disabled or not,  
12 right?

13 A. No, I did not.

14 Q. And before that exam on February 26th, 2007  
15 you never believed or felt that anybody  
16 discriminated against you?

17 A. No.

18 Q. Meaning no, you never felt that?

19 A. No, I never felt that, correct.

20 Q. In 2006 is when your knee pain started  
21 getting worse, correct?

22 A. Yes.

23 Q. And that's when you started using a cane?

24 A. I used a cane occasionally, yes.

25 Q. Now, I'm going to focus you 2006, about the

1 fall of 2006 going forward.

2 A. Okay.

3 Q. Okay? So we're both on the same, in the  
4 same place. And you were also testified  
5 yesterday that at times you had to take  
6 antiinflammatory medication?

7 A. On a daily basis, yes.

8 Q. What did you take?

9 A. One of those, Lodine I believe was the  
10 antiinflammatory medication I was on at the  
11 time.

12 Q. And you testified yesterday also that you  
13 were taking at times pain medication?

14 A. Well, Lodine is an antiinflammatory/pain  
15 medication.

16 Q. So that's the medication you would take  
17 when you were working?

18 A. Yes.

19 Q. At that point you started slowing down a  
20 bit?

21 A. Yes.

22 Q. Knee pain was getting worse?

23 A. Occasionally, yes.

24 Q. And in fact it was getting to the point  
25 where you saw an orthopaedic surgeon in October

1 of 2006, right?

2 A. Yes.

3 Q. And that's Dr. Oplinger?

4 A. Dr. Oplinger, yes.

5 Q. And you were getting shots in your knees at  
6 that point?

7 A. I got a shot of cortisone in my knee in  
8 October.

9 Q. And Dr. Oplinger was talking to you at that  
10 time, even at that time about needing a knee  
11 replacement?

12 A. He went over the possibility, yes.

13 Q. And it was a bilateral knee replacement?  
14 Both knees?

15 A. Not initially, no, I had no complaints in  
16 my right knee.

17 Q. And the reason that you used the walking  
18 stick was to give you some balance because of  
19 the back problems you were having and the knee  
20 problems, correct?

21 A. Yes.

22 Q. And in fact at times it was very, extremely  
23 painful bending that left knee, wasn't it?

24 A. Eventually, yes, extremely.

25 Q. Plus it was getting more difficult to climb

1 stairs at that point?

2 A. A little bit slower, yes.

3 Q. And you were starting to need to sit down  
4 and rest more?

5 A. No. I took authorized breaks that were  
6 given to us by, you know, the warehouse.

7 Q. Okay, and now with prolonged activity your  
8 knee pain would increase, your back pain would  
9 increase?

10 A. No, with prolonged activity my knee pain  
11 lessened and the back pain lessened. It was in  
12 the mornings after laying up all night that my  
13 knee was stiff and my back hurt.

14 Q. Now, isn't it true, Mr. Shaw, that that  
15 knee pain was constant?

16 A. No, it is not true at that time.

17 Q. At what time, sir?

18 A. The time we're talking about.

19 Q. 2006/2007?

20 A. Yes, it was not constant.

21 Q. When did it become constant?

22 A. Late 2007, early 2008.

23 Q. So it was getting progressively worse,  
24 whatever the condition was it was getting  
25 progressively worse?

1       **A.** Yes.

2       **Q.** You testified yesterday that by the  
3       afternoon from walking on the concrete you  
4       needed that knee support of that cane or that  
5       walking stick?

6       **A.** Occasionally near the end of the shift is  
7       what I said.

8       **Q.** And that's an eight hour shift, right?

9       **A.** Yes, it is.

10      **Q.** Now, during that time of 2006, late 2006  
11      into 2007 you still were responsible for doing  
12      all the duties of that warehouse job, weren't  
13      you?

14      **A.** Yes, I was.

15      **Q.** And it was your choice to begin operating  
16      that forklift more?

17      **A.** It was not my choice. It just happened, it  
18      evolved that way.

19      **Q.** Well, you say it evolved that way, but if  
20      all the warehouse workers, including Mr. Kline,  
21      having to do all those duties, forklift is an  
22      easy job, isn't it?

23      **A.** Well, yes, it is.

24      **Q.** Yeah. So if I'm a warehouse worker maybe I  
25      want to sit on the forklift 50 percent of the

1 time. What made you decide that you could do  
2 that?

3 A. I did not decide it. See, item number 3 on  
4 the assigned duties here, accurately checking  
5 stock, order from branches and vendors, very few  
6 people liked to check stuff in and put it away,  
7 because some of the guys couldn't really count  
8 too good and they didn't like the responsibility  
9 of signing their name to the check-in form. I  
10 could count and I liked to put stuff away so it  
11 was properly organized. So it became my  
12 responsibility. If I was off for one day and I  
13 came back the next there would be orders sitting  
14 around from the afternoon before that came in  
15 that hadn't been checked in because I wasn't  
16 there.

17 Q. Okay. 2006, 2007, how many workers were in  
18 that warehouse with you?

19 A. Day shift we had six, six of us that pulled  
20 for vendors and stuff.

21 Q. Only six workers, you making seven?

22 A. No, six that had the responsibility of as  
23 warehouse worker. Then we had a manager mostly  
24 did, who was also a warehouse worker that did  
25 brake shoes, and then we had a man who did cores

1 who was also a warehouse worker, but that was  
2 his specialty.

3 Q. Okay. So there was -- how many did the  
4 actual job that you were doing that's on this  
5 list?

6 A. About six.

7 Q. And you made seven?

8 A. No, six including me.

9 Q. Okay. I just wanted to clarify. Just  
10 including you?

11 A. I thought I had.

12 Q. So of the six, you're saying that five  
13 people didn't like checking in orders? I mean  
14 hey --

15 A. That is correct.

16 Q. -- I'd like to sit on the forklift and  
17 check in orders. You're telling me --

18 A. Well, you don't check in orders while  
19 you're sitting on the forklift. You get off,  
20 you count what's on the pallets.

21 (Brief pause.)

22 Q. I'm listening.

23 A. And then you put it away.

24 Q. And that's what you were physically doing  
25 then?



1       **A.** Yes.

2       **Q.** So you were using the forklift, unloading,  
3 getting off that forklift, going through that  
4 stock, and actually putting it, moving it to the  
5 shelves and putting it on the shelves?

6       **A.** Yes.

7       **Q.** You did that going up to the second floor,  
8 too?

9       **A.** I put stuff up on the second floor then  
10 went up to the second floor. Some of the stuff  
11 on the second floor I checked in and put away.  
12 Some of it I did not.

13       **Q.** Isn't it true, Mr. Shaw, that you had other  
14 employees in that warehouse assisting you with  
15 your job duties that you were unable to  
16 physically do?

17       **A.** Which ones are you referring to, ma'am?

18       **Q.** Tell me, sir. I'm just asking that  
19 question. Did you have other employees take on  
20 some of your duties that you were not physically  
21 able to do?

22       **A.** No, I did not.

23       **Q.** Really? Mr. Shaw, this is a deposition  
24 that you gave on January 12th, 2010.

25       **A.** Yes, ma'am.

1 Q. At that time you also took an oath to tell  
2 the truth, correct?

3 A. Yes, ma'am.

4 Q. Could you turn to page 22, please? Line 13  
5 through 16. I'll ask the question, you give the  
6 answer.

7 A. Oh, there's four pages on each. Was that  
8 what we're looking at?

9 Q. We're looking at page 22. Did you find it?

10 A. Yes, I see it.

11 Q. Go to line 13.

12 A. Line 13.

13 Q. I'll ask the question, you give me the  
14 answer. Question, "Did you ever ask any other  
15 employee in the warehouse to assist you with job  
16 duties that you weren't able to perform?" What  
17 is your answer?

18 A. "Why, yes, I did quite often."

19 Q. Okay. So by asking other employees to do  
20 duties that you weren't able to perform, they  
21 were doing your job, weren't they?

22 A. No, they were assisting me in my job. I  
23 was not able to perform lifting up many items  
24 such as fifth wheel heads, which way upwards of  
25 250 pounds. I was not able to be a four-man

1 crew to separate dollies, trailer legs that came  
2 in one part number on this skid, one part number  
3 on this skid, that had to be put on a central  
4 skid and paired up. I asked people to help me  
5 do that because it's easier for four men to do  
6 that than one man.

7 Q. You asked people to go upstairs for you to  
8 pull product if you needed to?

9 A. Occasionally I did because they were faster  
10 and easier for a customer that was waiting at  
11 the door.

12 Q. You said you were on that forklift 50  
13 percent of the time?

14 A. Could be. Maybe 40 percent, maybe 30  
15 percent some days.

16 Q. So it changed, it was based on how many --

17 A. Based on whatever duties we had to perform.

18 Q. I believe you testified, correct me if I'm  
19 wrong, that you started having difficulty going  
20 up those steps in 2006, September of 2006?

21 A. Could have been earlier than that.

22 Q. Now, as far as operating that forklift, you  
23 said something interesting yesterday and I want  
24 you to clarify it. If you had heard that there  
25 had been some testimony that no one was able to

1 confirm it, but there had been some allegation  
2 that you had operated the forklift with your  
3 cane, or walking stick -- let me just ask the  
4 question. That was testimony that was heard in  
5 the courtroom, correct?

6 A. Pardon?

7 Q. That was testimony that you heard in the  
8 courtroom?

9 A. About what?

10 Q. About an allegation that you operated that  
11 forklift with a cane.

12 A. Yes.

13 Q. You testified yesterday that it was not  
14 possible to operate that forklift with a cane  
15 because you had one hand on the steering wheel,  
16 you had one hand on the controls lifting those  
17 forks up and down, right?

18 A. Yes.

19 Q. But you're not operating those forks while  
20 you're driving.

21 A. Yes, you are.

22 Q. You're moving those forks up and down as  
23 you're operating the forklift, sir?

24 A. Yes, you are.

25 Q. Okay. Here's something else that I found

1 interesting. No one testified as to how that  
2 forklift could have been operated with a cane  
3 except for you, sir. Do you remember that?

4 A. No, I do not. I don't know what you mean.

5 Q. Well, when you were describing the  
6 situation you said you had one hand on the  
7 steering wheel, one hand here, and how does  
8 somebody take that cane and operate that brake.

9 A. Oh, because the thing with the brake came  
10 about during the rebuttal of my first, after I  
11 made my initial complaint to the EEOC, ADA,  
12 whatever it was. The rebuttal of my complaint  
13 specified six times that I used my cane to  
14 utilize the brake on the forklift.

15 Q. Okay. So that's where that information  
16 came from?

17 A. That's where that information came from,  
18 and then we took pictures to show that it  
19 couldn't be done.

20 THE COURT: All right. Counsel, please  
21 approach.

22 (Side bar at 12:06 p.m.)

23 THE COURT: Are you going to get to a good  
24 stopping point? How much more do you have?

25 MS. SALTZ: I have lots. I have a lot of

1 documents to go through, I have a lot of things,  
2 but I can stop whenever you want because I've  
3 organized them in such a way that whenever you  
4 say, it's fine.

5 THE COURT: Terrific. All right, let's go  
6 to about 12:30, quarter of 1:00, since we took a  
7 short break a while back, and we'll take kind of  
8 a later lunch. I'm a little concerned about  
9 this whole operating a forklift with a cane  
10 issue because it came up on direct as something  
11 that -- is it even an allegation in this case?  
12 Are you going to present evidence that in fact  
13 he was?

14 MS. SALTZ: No, but the thing is no, I  
15 wasn't even going to bring it into the case  
16 until it was brought in, you know, through the  
17 other witnesses and stuff, but what surprised me  
18 was this ability to describe clearly when no one  
19 else did as to why, so I have no --

20 MR. RUSSO: And she's got the third arm  
21 coming out of his chest in the description  
22 yesterday.

23 THE COURT: Well, to me it's --

24 MS. SALTZ: I'm moving away from it.

25 THE COURT: To me it's a red herring, it

1 really is -- and it's irrelevant. That's why I  
2 was bringing it up, unless you were going to  
3 pursue this in --

4 MS. SALTZ: No, I'm going to another area  
5 right now.

6 THE COURT: All right. Terrific.

7 MS. SALTZ: Done. Done with that.

8 THE COURT: No problem. All right, thank  
9 you, and keep going for a while.

10 MS. SALTZ: I'll keep looking at you.

11 (Side bar concluded at 12:08 p.m.)

12 THE COURT: Ladies and gentlemen, we're  
13 going to take our break a little bit later today  
14 because we did have a late morning break. We  
15 kind of are pushed back maybe a half an hour, so  
16 we're going to keep going for a while. I won't  
17 forget about lunch, but we're going to keep  
18 going for a little bit. Ms. Saltz?

19 BY MS. SALTZ:

20 Q. Thank you, Your Honor. Now, you testified  
21 yesterday, Mr. Shaw, that at times you needed to  
22 take that antiinflammatory medication, pain  
23 medication.

24 A. Yes.

25 Q. And that was during the time you were

1 working?

2 A. Occasionally I would take one at lunch time  
3 when I ate, yes.

4 Q. And you didn't tell anybody at CTE that you  
5 were taking pain medication, did you?

6 A. It wasn't anybody's business but mine and  
7 my supervisor's.

8 Q. And yet, sir, you took pain medication, and  
9 what was it that you were taking?

10 A. Lodine.

11 Q. Lodine? And operating a forklift?

12 A. Yes.

13 Q. You're not supposed to operate machinery  
14 under pain medication, are you, sir?

15 A. It's not a narcotic, ma'am.

16 MR. RUSSO: Objection. Speculation.

17 THE COURT: I'm sorry, there was an  
18 objection?

19 MR. RUSSO: Objection. calls for  
20 speculation.

21 THE COURT: Overruled. I think the answer  
22 was, "It's not a narcotic."

23 A. It's not a narcotic. It was high powered  
24 aspirin.

25 Q. Okay.



1       **A.** What is -- I'm sorry. I was going to ask  
2       you a question, but I shouldn't I guess.

3       **Q.** No, I get to ask questions.

4       THE COURT: No, you shouldn't.

5       **Q.** Now let's go to the actual exam.

6       **A.** The what?

7       **Q.** The actual day of the exam with Concentra.

8       **A.** Oh, the first one?

9       **Q.** The first one.

10      **A.** Okay.

11      **Q.** You were working, you were asked to go see  
12      Brenda Hoffman, right?

13      **A.** Yes.

14      **Q.** And that's when she told you that you  
15      needed to go --

16      **A.** Yes.

17      **Q.** -- for the exam? You went to the exam?

18      **A.** Yes, I did.

19      **Q.** Did you discuss anything with regard to  
20      those job responsibilities with the physician  
21      assistant?

22      **A.** No. Well, yeah, I did discuss climbing  
23      stairs.

24      **Q.** Okay, and then when you got back you went  
25      right to Ms. Hoffman's office or --

1       **A.** Yes, I believe I did, yes.

2       **Q.** And that's when you were told that you had  
3 failed the exam?

4       **A.** Yes.

5       **Q.** Now, you wrote a letter after that, right?

6       **A.** The next day, yes.

7       **Q.** The next day. Let's take a look at what's  
8 been marked and I believe admitted as  
9 Plaintiff's Exhibit 11. It's Defendant's  
10 Exhibit D-7. We'll start with the second page.  
11 Let me give you this, I'm sorry, Mr. Shaw, keep  
12 this opened up to D-7. Now, I'm looking at D-7.  
13 On the second page, that is your signature, sir?

14       **A.** Yes, it is.

15       **Q.** Now I'm going to ask you to turn to the  
16 first page. I just want to go over some of this  
17 letter with you, as soon as I figure out how to  
18 make it smaller. Now, if you look at the first  
19 sentence of that letter you wrote, "It may be  
20 the opinion of Dr. walker that I cannot perform  
21 my job in my present physical condition." Right?

22       **A.** I wrote that, yes.

23       **Q.** And that was based on what Dr. walker for  
24 Concentra found that you were not able to do?

25       **A.** That is correct.

1 Q. And you disagreed with that doctor's  
2 opinion.

3 A. Yes, I did.

4 Q. And that's in the second paragraph of the  
5 letter, "I disagree with the doctor and his view  
6 of what I cannot do," correct?

7 A. Yes.

8 Q. And you felt that it was because of his  
9 opinion that your lifting had to do with your  
10 inability to squat and lift with your legs,  
11 right?

12 A. That's the only thing I could figure out  
13 why they decided I couldn't lift anything.

14 Q. But you couldn't squat, right? That was a  
15 problem for you?

16 A. Well, that just depends. I could squat.  
17 I squatted down about three or four inches. I  
18 couldn't go into a full baseball catcher's  
19 squat.

20 Q. Okay. Now, remember I had just asked you a  
21 little bit ago about the fact that the reason  
22 why you were on that forklift was that you could  
23 sit as much as you can and you said no and you  
24 sat during authorized breaks?

25 A. Yes.

1 Q. Take a look at the third paragraph, sir.

2 A. Third paragraph, okay.

3 Q. It says, "The fact that I'm unable to stand  
4 and walk for long periods is also not a problem  
5 because I sit whenever I can." Isn't that what  
6 you wrote?

7 A. And that is true.

8 Q. So you're sitting on the forklift, you're  
9 sitting when you're using the computer or the  
10 telephone, you're sitting on boxes of brake  
11 drums when you're counting brakes?

12 A. Yes, and there was nothing wrong with that  
13 and nobody had a problem with it.

14 Q. Now, you also told Ms. Hoffman at that time  
15 that climbing ladders or stairs is a problem for  
16 you.

17 A. Yes. I said that.

18 Q. And it's painful.

19 A. Sometimes, yes.

20 Q. And you also in this letter are telling  
21 that new condition developed, didn't it? Last  
22 paragraph?

23 A. Oh, yes. Yeah, my left leg started  
24 retaining a little bit of moisture, water,  
25 fluid, whatever.

1 Q. And you also told Ms. Hoffman that you  
2 would get a statement as to your ability to  
3 continue working from your doctor, right?

4 A. Which I did.

5 Q. But you never gave that statement to CTE,  
6 did you?

7 A. Yes, I did.

8 Q. And what document is that, sir?

9 A. Dr. Dunkelberger.

10 Q. And what did you bring them?

11 A. I brought them Section 5 of the Reliance  
12 standard insurance form.

13 Q. The disability form, right?

14 A. Yes, ma'am.

15 Q. And that was not until what? April or May?

16 A. No, that was that next week I believe  
17 after I seen my doctor the next time.

18 Q. What about anything from Dr. Oplinger? You  
19 didn't bring anything from him saying that you  
20 could do the job, did you?

21 A. Didn't nobody told me it wasn't necessary.

22 Q. Now, Mr. Shaw, you go to an exam at  
23 Concentra for Dr. Walker, he failed you, you  
24 think he's wrong, right?

25 A. Yes, I did.

1 Q. And you believed sitting here telling this  
2 jury, you told this jury you believed you could  
3 do that job?

4 A. No, I did not believe I could do the job.  
5 I had been doing the job with no complaint from  
6 anybody.

7 Q. Okay, sir. Well, let's take a look at what  
8 you just said. No complaint from anybody. Just  
9 because someone doesn't complain, are you saying  
10 that it didn't matter whether it affected your  
11 health negatively or that it affected another  
12 coworker?

13 A. It did not affect my health negatively nor  
14 did it affect another coworker.

15 Q. You're not a doctor are you, Mr. Shaw?

16 A. Pardon?

17 Q. You're not a doctor?

18 A. Well, no, I'm not a doctor.

19 Q. My question to you, sir, is if you  
20 disagreed with Dr. Walker and you wanted to go  
21 back to work and you believed you could do the  
22 physical requirements of that job because you  
23 had been doing them, you had an orthopaedic  
24 surgeon, right?

25 A. Yes, I did.

1 Q. why did you not bring something from  
2 Dr. Oplinger saying "I can do the job"?

3 A. Nobody asked me to.

4 Q. Did you need someone to ask you to do that  
5 to go back to work?

6 A. Dr. Oplinger is not the one that failed me  
7 on the physical.

8 Q. Okay.

9 A. He had nothing to do with the physical.

10 Q. And what about accommodations? Did you  
11 need some accommodations? Wasn't he the doctor  
12 to go to to get the accommodations?

13 A. Again, ma'am, I was going the job without  
14 any accommodations.

15 Q. Mr. Shaw, having people do work for you is  
16 an accommodation, isn't it?

17 A. No. It is asking for assistance when  
18 necessary. Nobody outright did anything that I  
19 was supposed to do on a daily basis.

20 Q. Now, sir, on the last, on the second page  
21 you wrote at the end of that first paragraph,  
22 "You can leave the situation as it is and have  
23 for a very long time," correct?

24 A. Yes.

25 Q. Did you want CTE, the company, to

1 completely ignore a medical opinion that you  
2 could not perform certain duties of your job?  
3 Is that what you wanted them to do to,  
4 completely ignore Dr. walker?

5 A. Yes.

6 Q. Because you disagreed with Dr. walker?

7 A. Because I -- excuse me just a second.  
8 Dr. walker's opinion was wrong.

9 Q. And that was in your opinion it was wrong?

10 A. Yes, it was.

11 Q. Okay. So you didn't think it was necessary  
12 to bring your own doctor's certification to  
13 return you to work?

14 A. I did.

15 Q. I'm talking Dr. Oplinger, sir.

16 A. Nobody asked me to bring Dr. Oplinger, I  
17 brought one from Dr. Dunkelberger.

18 Q. Isn't it true, Mr. Shaw, that the reason  
19 why you didn't bring anything back from  
20 Dr. Oplinger was because Dr. Oplinger would not  
21 have cleared you to --

22 MR. RUSSO: Objection. Asked and answered.

23 A. Actually --

24 THE COURT: Hold it. There's been an  
25 objection. I don't believe it has been asked



1 and answered. The objection is overruled. You  
2 may answer.

3 A. Actually when I asked Dr. Oplinger to fill  
4 out number 5, section number 5 of the Reliance  
5 standard, he didn't do it because I had been  
6 working at the time.

7 Q. Excuse me for being a little confused.

8 A. Okay.

9 Q. Section 5 of the form for disability,  
10 correct?

11 A. Yes.

12 Q. When you give him that form you weren't  
13 working though, were you?

14 A. They had just prevented me from coming to  
15 work the first time that I gave him the form.

16 Q. Okay. You told him then at the time you  
17 were on medical leave, correct?

18 A. No, ma'am, I said they won't let me come to  
19 work because I failed a physical.

20 Q. Okay. What did he say?

21 A. He said because I had been working he  
22 didn't feel it was necessary for him to fill it  
23 out.

24 Q. But he did fill out that form, didn't he?

25 A. Eight months later he filled it out at my

1 request, my second request.

2 Q. And are you aware of what he noted in that  
3 form, sir?

4 A. Which one, the --

5 Q. When he filled it out.

6 A. Yes, I am.

7 Q. And he said at that time that you could not  
8 lift, carry, walk, and that you could only do  
9 sedentary employment, sit down work only. Isn't  
10 that what he said, sir?

11 A. That's exactly what he said.

12 Q. Now, let's -- you didn't want, let's talk  
13 about a little bit about modifications. You  
14 talked about, "You can modify my job description  
15 as a warehouse receiver to fit what I really  
16 do?"

17 A. That's correct.

18 Q. And what you testified yesterday in looking  
19 at those duties, there wasn't anything to modify  
20 there, was there?

21 A. Probably not.

22 Q. And you did not want CTE to modify the  
23 physical requirements of your job, did you?

24 A. They could have modified some of the  
25 physical requirements, but not by very much.

1 Q. That's not my question, sir.

2 A. Oh.

3 Q. My question is you didn't ask CTE to modify  
4 any of the physical requirements of that job,  
5 did you?

6 A. No.

7 Q. And you didn't want to have those physical  
8 requirements modified?

9 A. Maybe. Couldn't tell you whether I wanted  
10 to or not. It's been four years.

11 Q. Well, let's take a look at this. Could you  
12 turn to page 50 in your deposition, sir? The  
13 question was on line 17.

14 THE COURT: He's not there.

15 A. I'm here.

16 Q. Page 50, line 17. Question, "So the  
17 physical requirements were correct?" That's in  
18 the job analysis, right?

19 A. Yes.

20 Q. Okay, "But you would ask them to modify the  
21 duties part of it?" And you said, "Sure."

22 A. Sure.

23 Q. Okay. So that leads us to another point.  
24 So we've been going back and forth on this job  
25 analysis, D-1. So the physical requirements

1 listed here are the correct requirements of the  
2 job .

3 A. which one?

4 Q. I'm sorry.

5 THE COURT: He's got plaintiff's exhibit --

6 Q. Yeah, we're a little mixed up here between  
7 the two. D-1.

8 A. D-1. Oh, okay. What was the question on  
9 this?

10 Q. The question is, sir, did these physical  
11 requirements listed, occasional lifting up to  
12 150, frequent lifting up to 70, occasional  
13 sitting, frequent standing, frequent walking,  
14 frequent pushing, frequent pulling, frequent  
15 reaching, frequent growth grasping, occasional  
16 fine manipulation, frequent twisting, frequent  
17 bending, I'm sorry, occasional squatting,  
18 occasional climbing, occasional foot controls,  
19 and occasional driving are the proper physical  
20 requirements of that job.

21 A. Yes, ma'am.

22 Q. Okay. So now we're clear on that. There's  
23 no more controversy on that, right?

24 A. Okay.

25 MR. RUSSO: Your Honor, we pose an objection

1 to that. There is, the evidence is what the  
2 evidence is. It's for the jury to decide.  
3 There's been other testimony whether it is the  
4 requirements or not. Whether Mr. Shaw agrees  
5 those are the requirements of the job or not --

6 THE COURT: I understand that there was some  
7 editorializing and I'll just ask counsel for  
8 both sides not to editorialize with respect to  
9 the testimony. You may continue.

10 Q. Thank you. So when you wrote this letter  
11 and after this letter you never asked CTE for  
12 any kind of accommodation, did you?

13 A. I didn't ask that for any particular  
14 accommodation.

15 Q. Okay. Now, when you met with Brenda  
16 Hoffman --

17 A. On what day?

18 Q. After that exam.

19 A. Yes, ma'am.

20 Q. She made no comment to you about being  
21 disabled or regarding you as disabled, did she?

22 A. She said, "We want you to take this  
23 insurance disability because we, because you  
24 can't work here."

25 Q. Okay, but you were on medical leave, right?

1       **A.** No, ma'am.

2       **Q.** Just like before --

3       **A.** The term medical leave never came up until  
4 months later they started referring to it as  
5 medical leave.

6       **Q.** And she gave you paperwork for the  
7 company's disability benefits, right?

8       **A.** The disability benefits, yes.

9       **Q.** And that was up to you whether you wanted  
10 to request those disability benefits or not?

11       **A.** Well, it turned out that way. They didn't  
12 give me a choice. They said, "You can't work  
13 here, you may apply for disability."

14       **Q.** Okay. So they said, "You can't work here  
15 because Dr. Walker says that you can't meet the  
16 physical requirements of your job and here's  
17 paperwork on FMLA and here's paperwork on  
18 disability benefits that the company offers,"  
19 isn't that what happened?

20       **A.** Essentially, yes.

21       **MS. SALTZ:** Your Honor, this would be a good  
22 stopping point.

23       **THE COURT:** I'd like to continue until about  
24 a quarter of 1:00 if we could.

25       **MS. SALTZ:** No, that's fine.

1 THE COURT: All right?

2 BY MS. SALTZ:

3 Q. Now, two days later you said you had a  
4 meeting with Brenda Hoffman and Bryan Sheldon,  
5 right? That's the date you dropped off this  
6 letter, this letter of 2-28?

7 A. That's correct.

8 Q. And you were upset because you couldn't go  
9 back to work, right?

10 A. That is correct.

11 Q. But you don't remember what else was said  
12 at that meeting, do you?

13 A. Yes I do.

14 Q. Do you remember today what you said at that  
15 meeting?

16 A. Pardon?

17 Q. Do you remember today what was said at that  
18 meeting?

19 A. Well, not everything, but some things.

20 Q. Sir, what was said at that meeting?

21 A. Well, I asked why they thought I shouldn't  
22 be able to work. They said they felt that I was  
23 a danger in the warehouse. And I said what?  
24 They said they felt that I could hurt somebody  
25 or get hurt myself, and I said how, but they

1 couldn't give me an answer as to how I was a  
2 danger or I could hurt somebody. They were just  
3 afraid that I might hurt somebody.

4 Q. Now, you also, Dr. Oplinger as you agreed  
5 said that you could only do sit down work. Do  
6 you disagree with him, too?

7 A. Yes.

8 Q. The point --

9 A. When you're talking -- well, never mind.

10 Q. But that was Dr. Oplinger's assessment that  
11 you could only do sit down work.

12 A. A month later when I asked him to fill it  
13 out that way he did.

14 Q. Did you ask him specifically to fill out  
15 and say "I can't work"?

16 A. I asked him to make it sound like I needed  
17 a long R & R because they weren't going to let  
18 me go back to work.

19 Q. Mr. Shaw, were you asking Dr. Oplinger to  
20 commit fraud?

21 A. No.

22 Q. So whatever Dr. Oplinger determined was  
23 what he determined to be in his opinion your  
24 condition at that time?

25 A. We'll go with that, yes.



1 Q. Now, didn't the company tell you that as  
2 soon as your condition improved you could come  
3 back?

4 A. And I told them my condition would never  
5 improve, but yes, they did.

6 Q. And they wanted you back, didn't they?

7 A. That's open to interpretation. I'm not  
8 certain they did.

9 Q. Okay. Now, when you saw Dr. Oplinger in  
10 April of 2007 that's when he told you you needed  
11 a knee replacement, right?

12 A. No. He said it was still an option. He  
13 did not say I needed the knee replacement.

14 Q. So if there's testimony from Dr. Oplinger  
15 that he told you there's nothing else left to do  
16 but to go forward with a knee replacement --

17 A. He said eventually, yes.

18 Q. And you decided to hold off on that knee  
19 replacement?

20 A. Yes, I did.

21 Q. Even though that knee replacement could  
22 have helped you get back to work?

23 A. That's open to interpretation, too.  
24 There's no guarantee that a knee replacement is  
25 going to make you any better. It might lessen

1 the pain.

2 Q. But by June of 2008 you had the right knee  
3 replacement, right?

4 A. Yes, I did.

5 Q. And in August of 2008 you had the left knee  
6 replacement?

7 A. Yes, I did.

8 Q. In fact you were doing great after those  
9 knee replacements, weren't you?

10 A. No, I wasn't.

11 Q. So Dr. Oplinger -- but there's testimony  
12 here from Dr. Oplinger that you were going great  
13 after those knee replacements --

14 A. What's your interpretation of great, ma'am?  
15 I was walking without a cane on flat surfaces.

16 Q. And that was the first time you were  
17 walking without a cane on flat surfaces, wasn't  
18 it?

19 A. Pardon?

20 Q. That was the first time you were walking  
21 without a cane on flat surfaces?

22 MR. RUSSO: Objection as to --

23 A. After the operation, yes.

24 MR. RUSSO: In his life? Time frame?

25 THE COURT: All right, I think we understand

1 it's in context of recent developments.

2 MR. RUSSO: Okay.

3 Q. Now, after your knee replacement you never  
4 reapplied to CTE for a job again.

5 A. That is correct.

6 Q. And they asked you to reapply, didn't they,  
7 when they told you they had to finally replace  
8 you?

9 A. Yes.

10 Q. You never even wanted to try to go back?

11 A. This job analysis? Even after having  
12 gotten two knee replacements I could have not  
13 have passed it. I would not have passed it as a  
14 preemployment physical. So there was no need to  
15 reapply.

16 Q. Mr. Shaw, you didn't even bother to see if  
17 they could accommodate you in some way, did you?

18 A. By that time this lawsuit had been started  
19 and I would not have felt comfortable working  
20 for them or around them.

21 Q. Okay. Let's talk about what's been marked  
22 as Plaintiff's Exhibit 10, and it's Defendant's  
23 Exhibit 5. Are you there?

24 A. I'm there.

25 Q. Would you turn to the last page, sir? This

1 is the letter from Brenda Hoffman to you on the  
2 FMLA paperwork?

3 A. I'm sorry, what page, ma'am?

4 Q. Page D-5?

5 A. D-5, that's where I am, and you said the  
6 last page?

7 Q. Yes, sir. Right here.

8 A. Great.

9 Q. Both of them here together. You testified  
10 yesterday that you could not fill this out  
11 because there was no section here that applied  
12 to your situation.

13 A. That's correct.

14 Q. Okay. If you'd look at number 4?

15 A. Number 4?

16 Q. And read along with me. "Chronic  
17 conditions requiring treatment," right?  
18 "Requires periodic visits for treatment by a  
19 health care provider." You testified your knee,  
20 you had knee problems on and off since 1986 that  
21 started getting worse in 2006 that you went to  
22 see Dr. Oplinger for. Wasn't your knee  
23 condition a chronic condition, sir?

24 MR. RUSSO: Objection, Your Honor. She's  
25 asking to read one portion of a three prong test

1 for chronic condition and asking whether  
2 ultimately he has a chronic condition. She's  
3 asking a question that isn't in evidence, a  
4 three prong test under the statement.

5 THE COURT: The question is, "Wasn't your  
6 knee condition a chronic condition?" I think he  
7 can answer that question.

8 MR. RUSSO: Okay.

9 A. Okay. The knee condition was a chronic  
10 condition.

11 Q. Okay. Now, if you'd turn to page 2, or  
12 page 1 of the form?

13 A. Page 1.

14 Q. Okay? If you look at number C?

15 A. C.

16 Q. It says, "If the condition is a chronic  
17 condition..." --

18 THE COURT: I'm sorry, I apologize. I'm  
19 having trouble following you.

20 MS. SALTZ: That's okay, Your Honor. If you  
21 look at the letter, the first page of the  
22 letter, followed by the first page of the actual  
23 document.

24 THE COURT: Okay, 5?

25 MS. SALTZ: It would be under Section 5.

1 THE COURT: 5-C, okay.

2 THE WITNESS: 5-C.

3 BY MS. SALTZ:

4 Q. "If the condition is a chronic condition,  
5 state whether the patient is presently  
6 incapacitated and a likely duration of frequency  
7 of episodes of incapacity."

8 A. Yes. That's what it says.

9 Q. So that's something that could have been  
10 filled out, right?

11 A. No, ma'am. I was not incapacitated in any  
12 way other than not being able to pass D-1.

13 Q. In your opinion, sir, correct?

14 A. In my opinion, yes.

15 Q. Now, Mr. Shaw, would you --

16 A. Excuse me, hold on for a second.

17 Incapacitated, incapacity for purposes of FMLA  
18 is defined to mean inability to work, attend  
19 school, or perform other regular daily  
20 activities due to serious health conditions,  
21 treatment therefore, or recovery therefrom."  
22 I was not incapacitated according to that little  
23 statement right there, ma'am.

24 Q. Okay. But there's also other aspects of  
25 this form that could have been filled out by

1 your physician?

2 A. By which physician, ma'am?

3 Q. Dr. Oplinger, sir, who was treating you for  
4 your knee.

5 A. No, he could not.

6 Q. Well, he filled out your disability form,  
7 sir, didn't he?

8 A. Eventually, yes, after I asked him. Twice.

9 Q. Now, Mr. Shaw, you testified yesterday that  
10 you didn't want to fill out the disability, the  
11 information for disability benefits?

12 A. That is correct. I did not want to fill it  
13 out.

14 Q. Because you believed you would be  
15 committing fraud.

16 A. Yes.

17 Q. So when you did finally fill them out were  
18 you committing fraud then?

19 A. Probably so. In a strict legal sense  
20 maybe. Nobody's tested it yet though.

21 Q. So you, in your opinion you believed that  
22 you did not have any kind of physical  
23 restrictions preventing you from your job,  
24 right?

25 A. I had no physical restrictions preventing

1 me from doing my job.

2 Q. In your opinion.

3 A. In actual fact.

4 Q. In your opinion, sir?

5 A. No, ma'am. In actual fact I had no  
6 physical restrictions.

7 Q. Based on your belief?

8 A. That's not a belief.

9 THE COURT: I think we've covered, I think  
10 we've covered this ground.

11 A. It is their belief here that I did not,  
12 that I could not perform my job.

13 Q. It was the doctor's belief.

14 A. It was the --

15 THE COURT: Again you don't need to respond.  
16 We've covered this ground. Let's move on.

17 Q. And so the fact is is that you nevertheless  
18 filled out the disability paperwork, correct?

19 A. I eventually did, yes.

20 Q. And you also filled out paperwork for  
21 worker's comp?

22 A. I requested that the case be referred to  
23 worker's comp.

24 Q. And the reason for the worker's comp was  
25 that you were claiming that you, again it was



1 your knee problem, right? Knees and lower legs  
2 was the problem.

3 A. If they were going to put me out of work  
4 we were going to have a good reason for it.

5 Q. Were you committing fraud when you were  
6 filling out the paperwork for worker's comp?

7 A. No, actually I wouldn't have been because I  
8 had an existing condition aggravated by working  
9 conditions, which falls under the description of  
10 workman's comp.

11 Q. And you were denied workman's comp,  
12 correct?

13 A. Yes, I was, because they never let me go to  
14 a doctor or their orthopaedic surgeon.

15 Q. You could have gone to your orthopaedic  
16 surgeon.

17 A. No, I could not have gone to my orthopaedic  
18 surgeon for worker's comp. I don't believe he  
19 was on their panel. You have to go be seen by a  
20 general practitioner and then referred to an  
21 orthopaedic surgeon on their physician's panel.  
22 I never got to see the general practitioner  
23 because the insurance company said no, this is  
24 not a case, so they denied it.

25 Q. Now, Mr. Shaw, you applied for social

1 security benefits, didn't you?

2 A. Yes, I did.

3 Q. And you applied for those benefits in  
4 November 21st, 2007?

5 A. No.

6 Q. Sir, would you turn to D-35, please?

7 A. D what?

8 Q. D-35.

9 A. D-35, okay. Okay.

10 Q. And would you take a look at that first,  
11 this is a letter from social security to you?

12 (Brief pause.)

13 THE COURT: I think she's just asking you to  
14 identify the letter.

15 A. Oh.

16 Q. Yes, thank you, Your Honor. It says, "On  
17 November 21, 2007 we talked with you and  
18 completed your application for social security  
19 benefits."

20 A. Okay. That's what it says.

21 Q. Okay.

22 A. I did not do anything with social security  
23 until January of 2008.

24 Q. But at least you started the process in  
25 November of 2007, you would agree with that?

1       **A.** No. I didn't start anything until 2008.  
2       January.

3       **Q.** What's the date of the letter from social  
4       security, sir?

5       **A.** It says November 30th.

6       **Q.** 2007?

7       **A.** Okay. I don't recall doing anything in  
8       November of 2007. Evidently I must have filled  
9       something out.

10      **Q.** Okay.

11      **A.** I don't remember, really don't remember  
12      doing anything until January of 2008.

13      **Q.** Now, Mr. Shaw, would you look at  
14      Defendant's Exhibit 36, please?

15      **A.** Defendant's 36?

16      **Q.** Are you there?

17      **A.** I'm there.

18      **Q.** Now, would you just flip through these  
19      pages and tell me is this your handwriting and  
20      is this a typed portion of information you  
21      provided to social security?

22      **A.** Yes, ma'am, it is.

23      **Q.** Now, would you turn to the third page,  
24      please?

25      **A.** I'm there.

1 Q. If you look at number 13?

2 A. Okay.

3 Q. It says, "Any changes in cooking habits  
4 since the illness, injuries, or conditions  
5 began?" Right? Are you reading with me?

6 A. Oh, yes. Any changes, yes.

7 Q. And you said, "Got to sit down to do most  
8 things."

9 A. That's right.

10 Q. If you go down to 14-A? "List household  
11 chores, both indoors and outdoors, that you are  
12 able to do," and in that second sentence, sir,  
13 you wrote, "Sweeping and mopping is done by  
14 local kids, as is the yard work." So you  
15 weren't doing any sweeping or mopping or yard  
16 work, correct?

17 A. I hadn't been doing any sweeping or mopping  
18 for years, ma'am. Or yard work. Local kids had  
19 to make money and I was glad to let them do it.

20 Q. If you turn to the next page? It says, "If  
21 you don't do house or yard work, explain why  
22 not," sir, and what did you write there,  
23 Mr. Shaw?

24 A. Where are we at?

25 Q. Very top, B.

1       **A.** Okay. "Can't use the broom or mop because  
2 of my back." That's why I hadn't been doing  
3 sweeping and mopping for years, and what --

4       **Q.** Can't move, can't move -- can't mow or  
5 garden?

6       **A.** Can't mow or garden because of my back and  
7 knees.

8       **Q.** Now, wasn't sweeping one of the job duties  
9 that you had at Cumberland in the warehouse?

10       **A.** Yes, ma'am, it was, but there was a  
11 different kind of sweeping.

12       **Q.** If you'd turn to the next page, sir? Look  
13 at the section that's marked 18-C.

14       **A.** Okay.

15       **Q.** "Describe any changes in these activities  
16 since the illnesses, injuries, or conditions  
17 began," and what did you write here?

18       **A.** "I have to sit down to do most things. I  
19 can stand only by leaning on work tables or  
20 stools."

21       **Q.** Okay. Now, if you turn to the next page?

22       **A.** Next page?

23       **Q.** Section C, information about abilities.

24       **A.** Yes, ma'am.

25       **Q.** "Checking any of following items that your

1 illness, injuries, or conditions affect," and  
2 you checked?

3 A. Lifting, squatting, bending, standing,  
4 walking, sitting, kneeling, stair climbing,  
5 seeing.

6 Q. Okay, and for the explanation, sir, what  
7 did you write there?

8 A. "Bad knees prevent me from squatting,  
9 kneeling, standing for long periods of time,  
10 walking very far. Bad back prevents me from  
11 bending, standing for long periods. Combination  
12 prevents me from lifting per OSHA standard,  
13 OSHA, and stair climbing. Can't sit in a normal  
14 high chair. Right eye vision," actually that  
15 should have been my left eye but they never  
16 questioned me on that.

17 Q. And look at Section C. "How far can you  
18 walk before needing to stop and rest?" what did  
19 you tell social security?

20 A. I said, "About 150 feet," and crossed it  
21 out and put yards. I was going by the distance  
22 of a football field, and I'm not a football fan,  
23 so I really wasn't sure.

24 Q. Then it says, "If you have to rest how long  
25 before you can resume walking?" what did you

1 write?

2 A. "Four to five minutes."

3 Q. Turn to the next page, sir.

4 A. Okay.

5 Q. And at the very bottom it says for 21, "Do  
6 you use any of the following?" And you checked  
7 off cane and put in walking stick, right?

8 A. Yes.

9 Q. And then would you read to the jury what  
10 you wrote for, "When do you need to use these  
11 aids?"

12 A. "I need the walking stick daily with the  
13 bad back and bad knees. My balance is off and  
14 it helps me to remain upright. When my back  
15 spasms I use the shorter cane and walk a lot  
16 slower."

17 Q. Now, if you would turn to the next page?

18 THE COURT: Before we get to that I think  
19 now would be a good time for us to take our  
20 lunch break. And, Mr. Shaw, because you're on  
21 cross examination I have to give you an  
22 instruction that you refrain from any  
23 conversations with your counsel about the  
24 subject matter of your testimony.

25 THE WITNESS: Yes, I understand, sir. Yes.

1 THE COURT: I'm not picking on you. That's  
2 a standard instruction that I give --

3 THE WITNESS: Right.

4 THE COURT: -- to witnesses on cross  
5 examination. It doesn't mean you can't speak to  
6 them. It just means you can't talk to them  
7 about the substance of your testimony.

8 THE WITNESS: Right.

9 THE COURT: Ladies and gentlemen, we'll take  
10 a recess for approximately one hour. Let's  
11 reconvene and we'll start our afternoon session  
12 at 2:00. So we're in recess until that time.  
13 Please recall all of my earlier instructions,  
14 and we'll see you back here at a little bit  
15 before 2:00. Let's try to start promptly at  
16 2:00. We're in recess.

17 (Lunch recess taken from 12:47 to 2:03  
18 p.m.)

19 THE COURT: Please be seated. Ms. Saltz,  
20 you may continue.

21 MS. SALTZ: Thank you, Your Honor.

22 BY MS. SALTZ:

23 Q. Mr. Shaw, we're still on Defendant's  
24 Exhibit 36. We left off with the typewritten  
25 section.



1       **A.** Okay.

2       **Q.** If you can get to it, please? Are you  
3 there?

4       **A.** I'm there.

5       **Q.** Now, you testified that this is something  
6 that you typed up and you wanted to be as  
7 concise as possible, correct?

8       **A.** Yes.

9       **Q.** Now, I direct you to the third bullet  
10 point, "need walking stick to get around."  
11 Do you see that?

12       **A.** Yes, I see that.

13       **Q.** Then take you to the sixth bullet point,  
14 "he had changed the bandage on my nonhealing  
15 ulcer on my right leg."

16       **A.** Yes.

17       **Q.** And a little further down it says, "I do  
18 most jobs sitting. I use a grabber to pick  
19 things up."

20       **A.** Yes.

21       **Q.** Can you turn to the next page, please, sir?  
22 Now, after breakfast you told social security  
23 that you take your second or third pain pill?

24       **A.** Yes.

25       **Q.** The second bullet point, during your

1 shopping trip, "I take my cane or walking stick  
2 but leave it in the truck if I can make it to  
3 the shopping cart for support."

4 A. Yes.

5 Q. You also told social security that you  
6 could only walk with support for about 45  
7 minutes before the knee pain gets bad?

8 A. I did.

9 Q. And then also, "effort at bending my left  
10 knee to get in the truck is extremely painful."

11 A. Yes. Yes.

12 Q. You also told social security, "I need my  
13 walking stick for support when I return home to  
14 get up the steps to the door."

15 A. Yes.

16 Q. How many steps to your door, sir?

17 A. Four or five.

18 Q. Then further down, "If I set too long at my  
19 computer desk my knees lock up and I need my  
20 walking stick to lean on for six or seven  
21 steps." Is that true?

22 A. That is true.

23 Q. "After my shopping trip I have to sit and  
24 rest my knees for a while."

25 A. This is true.

1 Q. Now, if you go to the very bottom, sir,  
2 section B, number 10? Could you read for the  
3 jury what you wrote there?

4 A. The whole thing?

5 Q. Prior, right.

6 A. The whole thing?

7 Q. The bottom part where it says section B,  
8 number 10.

9 A. The whole paragraph.

10 Q. Yes.

11 A. "Prior to my condition I worked in a  
12 heavy..." --

13 THE COURT: slowly. slowly.

14 A. I'm sorry.

15 THE COURT: No problem.

16 A. "Prior to my condition I worked in a heavy  
17 duty parts warehouse. I could lift and toss 140  
18 plus pound brake drums from one pallet to  
19 another. Because I cannot bend my knees I  
20 cannot lift properly per OSHA standards, which  
21 is why I lost my job. I used to go for long  
22 walks in the woods, which I cannot do now. I  
23 can probably walk one-half length of a football  
24 field. Then I have to stop and rest."

25 Q. If you turn to the next page, sir?

1       **A.** Okay.

2       **Q.** Where is your pain located, that section?  
3       Could you read for the jury what you wrote?

4       **A.** Let me see. Oh, "Where is your pain  
5       located? Knee pain is from front outside.  
6       Back pain is lower back."

7       **Q.** And where does it spread? What did you  
8       write?

9       **A.** "Knee pain is constant. Back pain spreads  
10      upward after prolonged activity."

11      **Q.** What activities caused you to have pain?  
12      And you wrote there all those mentioned, which  
13      are bending, standing, walking, temperature  
14      extremes, plus sitting in one place too long,  
15      is that correct?

16      **A.** That is correct.

17      **Q.** And "how often does your pain occur?" You  
18      wrote daily, at the very bottom?

19      **A.** Oh. I'm sorry, what are we looking --

20      **Q.** It says, "How often does your pain occur?"  
21      Do you see --

22      **A.** Oh, how often does your -- yeah, okay.  
23      Daily.

24      **Q.** And how long does your pain last?

25      **A.** Constantly.

1 MS. SALTZ: Now, Mr. Shaw -- Your Honor, at  
2 this time I would like to move for admission of  
3 D-36.

4 THE COURT: Any objection?

5 MR. RUSSO: No objection, Your Honor.

6 THE COURT: All right. It is admitted.

7 BY MS. SALTZ:

8 Q. Now, Mr. Shaw, would you turn to D-37,  
9 please?

10 A. Pardon?

11 Q. D-37. The next tab.

12 A. Okay.

13 Q. And, sir, is that a letter from the Social  
14 Security Administration directed to you?

15 A. Yes, it is.

16 THE COURT: Counsel, would you please  
17 approach?

18 (Side bar at 2:07 p.m.)

19 THE COURT: We have the issue now of where  
20 you're going with the award. What do you --

21 MS. SALTZ: I'm not going to admit the  
22 exhibit into evidence. I just want that he was  
23 deemed under their rules to -- we will stipulate  
24 to that.

25 (Discussion off the record.)

1 THE COURT: All right. Counsel indicated  
2 that they would stipulate to the fact that he  
3 received social security disability benefits,  
4 but I'm going to allow defense counsel to bring  
5 it out on this exhibit. My concern is the  
6 dollar amounts in the exhibit.

7 MS. SALTZ: No, I'm just, he is now in one  
8 sentence, I'm just introducing it and not doing  
9 anything further. Thank you.

10 THE COURT: Okay, thank you.

11 (Side bar concluded at 2:09 p.m.)

12 THE COURT: Ladies and gentlemen, we might  
13 have some audio problems. Mr. Armstrong, just  
14 let me know if you have any continued problems.

15 BY MS. SALTZ:

16 Q. This letter from the Social Security  
17 Administration awarded you benefits, correct?

18 A. That is correct.

19 Q. Now, could you please tell the jury based  
20 on social security the date you became disabled  
21 under their rules?

22 A. February 27th, 2007 is what it says here.

23 MS. SALTZ: Thank you, sir. I have no  
24 further questions, Your Honor.

25 THE COURT: All right, thank you, Ms. Saltz.

1 Mr. Russo, any redirect?

2 MR. RUSSO: A couple, Your Honor, please.

3 THE COURT: Certainly.

4 REDIRECT BY MR. RUSSO:

5 Q. Good afternoon, Ricky. In your testimony  
6 you talked about the warehouse.

7 A. Yes, sir.

8 Q. You mentioned at the end that there were  
9 two forklifts and a man-up. What's a man-up?

10 A. It's a vehicle, the operator stands in a  
11 cubicle, in an enclosed cubicle. It has a mast  
12 that when you press the button the cubicle moves  
13 up and, moves up and down the mast fifteen or  
14 eighteen feet, I'm not sure exactly what the  
15 height was. The forks are behind the operator  
16 that you have your skid on. So the operator  
17 stands there and presses the button and goes up  
18 to a shelf and then gets stuff off and puts it  
19 on a skid or in the box that's on the forks.

20 THE COURT: Sort of like a portable  
21 dumbwaiter?

22 A. Yes, sir. Something like that, yes.

23 THE COURT: All right.

24 Q. So this was something that you could reach  
25 to the second level of racks with?

1       **A.** You could reach to the top rack.

2       **Q.** So you could go to the second level, the  
3 mezzanine with it?

4       **A.** We often did, yes, sir, although we weren't  
5 supposed to.

6       **Q.** So was this an alternative to using stairs?

7       **A.** No, because you're not supposed to exit the  
8 man-up while it's in the air unless you're  
9 climbing to get something way in the back,  
10 sitting it on the mezzanine level, and exiting  
11 it would not have been a good idea.

12       **Q.** Okay.

13       **A.** It could be done, but it was not a good  
14 idea.

15       **Q.** Ricky, do you know if Cumberland Truck has  
16 a maintenance department or a janitorial  
17 department there?

18       **A.** Not for the warehouse they didn't.

19       **Q.** Okay. So if there was a spill somebody  
20 would have to clean it up or something like  
21 that?

22       **A.** A warehouse worker would do it, yes.

23       **Q.** You had testified under cross examination  
24 that you got worse between 2007 and 2008.

25       **A.** Yes.



1 Q. Do you remember that? Can you tell us why  
2 you got worse?

3 A. Because I wasn't working on a daily basis.  
4 When you go to work you walk a little bit, you  
5 stand a little bit, you bend a little bit, and  
6 then you do it all over again. During the time  
7 that after I was put off from working I didn't  
8 do any of that. I did other things that  
9 interested me. Most of it was in my shop making  
10 little wood projects for the local people.

11 Q. I think you indicated this, but moving  
12 helped, is that right?

13 A. Yes, sir, moving helped a lot.

14 Q. I'm going to ask you, you were asked to  
15 read from page 22 of your deposition transcript.  
16 Can you go back to page 22? Do you still have  
17 it in front of you?

18 A. Yes, sir.

19 Q. And Ms. Saltz had you start with line 13.  
20 I'm going to ask, I'll do what she did, I'm  
21 going to ask you the questions and you answer.  
22 Okay?

23 A. Yes, sir.

24 Q. "Did you ever ask any other employees in  
25 the warehouse to assist you with job duties that

1 you weren't able to perform?"

2 A. "Why, yes, I did, quite often."

3 Q. "Can you explain to me what that would be?"

4 A. "Sure. You get, we got in two skids of  
5 twenty legs each. Twenty legs that would go on  
6 one side of the trailer. Twenty legs would go  
7 on the left side of the trailer, but we sell  
8 them as sets. So we would have to take these  
9 twenty on each one and put it on a skid in the  
10 middle and lay them there, two sets to a layer,  
11 and the legs weighed up towards of eighty or  
12 ninety pound, and it was easier for me, well,  
13 actually four guys to consolidate the legs on  
14 two different skids. So yes, I asked for help  
15 there."

16 Q. And I believe you continue, your answer  
17 continues on page 23?

18 A. Oh, I'm sorry. "If there was an extremely  
19 heavy brake drum that I had to lift I would ask  
20 for help there, but that is what you are  
21 supposed to do per OSHA. Anything that you  
22 can't lift you're supposed to ask for help."

23 Q. Ricky, what you described in your  
24 deposition that Ms. Saltz called your attention  
25 to, that was asking for assistance, correct?

1       **A.** Yes, sir.

2       **Q.** Was that common?

3       **A.** It was very common, sir.

4       **Q.** Were you the only employee who asked for  
5 assistance?

6       **A.** No, sir.

7       **Q.** In Plaintiff's Number 11 in the third  
8 paragraph, can you read that for us again one  
9 more time?

10      **A.** Third paragraph.

11      **Q.** Not too quickly, because the reporter needs  
12 to get your words.

13      **A.** You mean the one starts with "the fact"?

14      **Q.** Yes.

15      **A.** Okay. "The fact that I am unable to stand  
16 or walk for long periods is also not a problem,  
17 because I sit whenever I can. I sit on the  
18 forklift. I sit when I use the computer or the  
19 telephone. I sit on boxes for brake drums when  
20 I am counting incoming freight."

21      **Q.** When you were sitting on the forklift were  
22 you working?

23      **A.** Yes, sir.

24      **Q.** Performing your duties?

25      **A.** Yes, sir.

1 Q. When you were sitting at the computer,  
2 performing your duties?

3 A. Yes, sir?

4 Q. Working? When you were sitting at the  
5 telephone, performing your duties?

6 A. Yes, sir.

7 Q. How about when you were sitting on boxes  
8 for brake drums when you were counting?

9 A. Yes, sir.

10 Q. Working?

11 A. I was working.

12 Q. Do you think that CTE considers you  
13 disabled?

14 A. They asked me -- correction. They told me  
15 to apply for disability insurance. So yes, I do  
16 believe they considered me disabled.

17 Q. Ms. Saltz asked you questions about why  
18 didn't you go to your doctor to try to get some  
19 other statement or some other notice, statement  
20 saying that you could work. You explained that.  
21 Did anybody, do you remember having a  
22 conversation with Mr. Sheldon about that  
23 subject, getting a doctor to certify that you  
24 could go back to work?

25 A. No, sir.

1 Q. You were present for Mr. Sheldon's  
2 testimony when he said, "I gave Ricky the  
3 opportunity to do that"?

4 A. I believe he said he gave me the  
5 opportunity to go to my doctor.

6 Q. Do you remember was he --

7 A. And he never did that.

8 Q. Okay. You talked about your knee  
9 replacement.

10 A. Yes, sir.

11 Q. That there was some discussion with  
12 Dr. Oplinger in April of 2007 that a knee  
13 replacement might be in the future.

14 A. That was the conversation, not a  
15 recommendation.

16 Q. why did you wait until 2008 to have your  
17 knee replacement?

18 A. I didn't want to have surgery, sir. I was  
19 getting along fine without it.

20 Q. And when you say you were getting along  
21 fine without it, what do you mean?

22 A. I was working fine without having to have a  
23 knee replacement.

24 Q. After your knee replacement Ms. Saltz asked  
25 you if you, why didn't you reapply to Cumberland

1 Truck. why didn't you do that?

2 A. well, for two reason. Number one, I could  
3 not have passed their physical, their job  
4 analysis at that time, and I had already started  
5 this lawsuit and I wouldn't have felt  
6 comfortable working for them or around them at  
7 that time.

8 Q. I thought you said you could never pass  
9 that job analysis.

10 A. I possibly could not have passed the job  
11 analysis even back in 2000 when I first started,  
12 I've never been able to squat very much.

13 Q. Describe for the jury how your physical  
14 condition changed from February 26th, 2007 until  
15 January 27th, 2008.

16 A. I gained about eighty pounds. Like I said,  
17 you know, I did go for walks, I tried to ride my  
18 bicycle but found out that the seat wouldn't  
19 hold me anymore, so I gave that up. It was too  
20 difficult anyway, but I would go for walks  
21 around the trailer park I lived in. I would go  
22 a little bit up the Appalachian Trail, not very  
23 far, but most of the day was spent in my little  
24 wood shop making birdhouses to hang in the trees  
25 for the local kids, making shelves for friends

1 and stuff like that out of the scrap wood that I  
2 had whole boxes full of collecting, just using  
3 up that. That's pretty much my spring and  
4 summer of 2007.

5 Q. Do you still have Defendant's Exhibit  
6 Number 36 in front of you?

7 A. Yes, sir.

8 Q. And again so the record is clear, what was  
9 the date that you completed this document?

10 A. January 11th, 2008.

11 Q. Ms. Saltz, called your attention to Section  
12 13, which deals with meals.

13 A. Yes, sir.

14 Q. And she had you look at that last entry  
15 correct?

16 A. Yes, sir.

17 Q. What are the first two words in that entry?

18 A. Any changes, or in my answer?

19 Q. And when you saw the words "any changes,"  
20 what did you understand you were describing?

21 A. My cooking.

22 Q. And was there a change in your cooking  
23 abilities?

24 A. No, just to what I cooked. I mean just  
25 the --

1 Q. Okay. The way you cooked at that time in  
2 January?

3 A. Yes.

4 Q. And Ms. Saltz also called your attention to  
5 Section 18, which is also on page 5. Again it  
6 says describe any changes in these activities.  
7 Was that your description of the activities as  
8 of that time?

9 A. Yes.

10 Q. Fair to say everything within D-36 was your  
11 assessment of your abilities at that time in  
12 January of 2008?

13 A. Yes, sir.

14 Q. Ricky, in Exhibit Number 36, Defense  
15 Exhibit Number 36, at any point do you remember  
16 filling anything out about accommodations for  
17 jobs?

18 A. No, sir.

19 Q. Did they ever ask you anything about if you  
20 had an accommodation could you work?

21 A. No, sir.

22 MR. RUSSO: Nothing else, Your Honor.

23 THE COURT: Any recross?

24 MS. SALTZ: Just very brief, Your Honor.

25 RECROSS BY MS. SALTZ:



1 Q. While you're on Defense Exhibit 36,  
2 Mr. Shaw?

3 A. Still on 36, okay.

4 Q. Just very briefly, under Section 18,  
5 hobbies and interests?

6 A. Yes, sir -- yes, ma'am.

7 Q. Just so that the jury is clear as to how  
8 this question, Question A talks about what are  
9 your hobbies and interests, correct?

10 A. Yes.

11 Q. Question B talks about how often and how  
12 well do you do these things.

13 A. Yes.

14 Q. And Question C then goes into describing  
15 any changes in these activities since the  
16 illness, injury, or condition began.

17 A. Yes.

18 Q. Sir, you testified right now to the  
19 previous question that since you went out on  
20 medical leave because you were not working your  
21 condition got worse because of the lack of  
22 activity, correct?

23 A. Yes, ma'am.

24 Q. But isn't it true, Mr. Shaw, that that's  
25 really something that you could have taken care

1 of for yourself?

2 A. How?

3 Q. You could have gone to your doctor and had  
4 him prescribe an exercise program, isn't that  
5 true, sir? You could have gone to nutritionists  
6 for a diet? Mr. Shaw?

7 A. Could have. Not very likely though.

8 Q. But the fact is, sir --

9 A. I didn't have the money to spend on a  
10 nutritionist, but --

11 Q. Did you have medical insurance?

12 THE COURT: Were you finished with your  
13 answer, sir?

14 A. Pardon?

15 THE COURT: I thought you were going to say  
16 something else. I just wondered if you were  
17 finished with your answer.

18 A. Yeah.

19 Q. I apologize, I didn't mean to interrupt.

20 THE COURT: Not a problem.

21 A. Okay. Now, where were we?

22 THE COURT: She asked you --

23 A. Go ahead.

24 THE COURT: She asked you if you had medical  
25 insurance. That was the question.

1       **A.** Yes, I had medical insurance, yes.

2       **Q.** So you could have gone to Dr. Oplinger,  
3       your orthopaedic surgeon, and had him work with  
4       you or a nutritionist to work with you to get  
5       you into some kind of good diet and exercise  
6       program, correct?

7       **A.** Possibly.

8       **Q.** So that was on you, sir, right?

9       **A.** In the end maybe, yes.

10       **Q.** Okay. Now, Mr. Shaw, you testified that  
11       because Cumberland Truck Company offered you a  
12       benefit that it has for all of its employees,  
13       which is a disability benefit, that it's up to  
14       you to choose to take or not take depending on  
15       your condition if you needed it or not. It was  
16       on that basis alone that you felt that they  
17       considered you disabled, is that true?

18       **A.** And the fact they wouldn't let me work,  
19       yes, ma'am.

20       MS. SALTZ: I have no further questions.

21       REDIRECT BY MR. RUSSO:

22       **Q.** A couple. Ricky, ever try to go on a diet  
23       before?

24       **A.** Yes, sir.

25       **Q.** How many times?

1       **A.** My wife had me on five or six diets in the  
2 last twelve years or so.

3       **Q.** Did they ever work?

4       **A.** Pardon?

5       **Q.** Did they ever work?

6       **A.** No, sir.

7       **Q.** Did you ever try any fitness routine,  
8 Ricky?

9       **A.** Yes, sir. I tried to walking and riding  
10 the bike.

11       **Q.** How did that go?

12       **A.** Not well. You hit it and then you just  
13 start slowing down, you do other things that  
14 interest you.

15       **Q.** Did you try these things before in the past  
16 without much success?

17       **A.** Yes, sir.

18       **MR. RUSSO:** Nothing else, Your Honor.

19       **MS. SALTZ:** No further questions, Your  
20 Honor.

21       **THE COURT:** And I have no questions,  
22 Mr. Shaw. You may step down. Mr. Russo, your  
23 next witness?

24       **MR. RUSSO:** We call Mr. Kern.

25       **THE WITNESS:** I need to sit down over there.

1 THE COURT: All right, we'll switch the  
2 chairs out. We'll take a short break, I also  
3 want to speak with counsel briefly about our  
4 schedule. Ladies and gentlemen, I don't believe  
5 that the case will be in your hands today. I'm  
6 pretty sure it will be in your hands tomorrow,  
7 but let me get a better handle on the schedule,  
8 we'll come back, and at the end of today's  
9 proceedings I'll try to give you an indication  
10 as to when we will ultimately provide the case  
11 to you for final deliberations. We'll take a  
12 15-minute, let's make it a 10-minute break, a  
13 shorter break. Let's reconvene at twenty of  
14 3:00, and, Ms. McKinney, you may escort the  
15 jury.

16 (Jury recessed at 2:26 p.m.)

17 THE COURT: Please be seated. I have only  
18 gotten partway through the objections to the  
19 Oplinger deposition. When is that going to be  
20 played, in the defendant's case?

21 MS. SALTZ: Yes, Your Honor.

22 THE COURT: How much more do you have  
23 Mr. Russo and Mr. Crocenzi?

24 MR. CROCENZI: Just Mr. Kern.

25 THE COURT: All right, and what do you have

1 first up?

2 MS. SALTZ: I'll be moving for a directed  
3 verdict obviously, Your Honor, and then after  
4 that depending on the court's ruling I have just  
5 two witnesses. Well, Oplinger's video, which I  
6 would then play, and then Mr. Staller, who's our  
7 economist.

8 THE COURT: Is Mr. Staller here?

9 MS. SALTZ: Yes, he is. He'll be here today  
10 into tomorrow, or he'll be available tomorrow  
11 morning if necessary.

12 THE COURT: Could we take him before we do  
13 the Oplinger deposition?

14 MS. SALTZ: Oh, we certainly can.

15 THE COURT: To give me a little additional  
16 time to rule on those objections? Unfortunately  
17 I didn't have the benefit of a transcript, so I  
18 literally have to watch the entire deposition to  
19 make those rulings.

20 MS. SALTZ: And I apologize for that, Your  
21 Honor. The court reporter for whatever reason  
22 did not think that she needed to produce one  
23 immediately and was not very friendly, and we  
24 were forced to have to work quickly. So I  
25 apologize to the court for that.

1 THE COURT: All right.

2 MR. SEMBROT: I'm running through it right  
3 now, and I've pinpointed all the objectionaries.  
4 I've got about maybe twenty minutes left, so I  
5 can give you a list of where all the objections  
6 exist and make it a quicker process.

7 THE COURT: Perfect. All right. Well, then  
8 we should be able to play that first if you want  
9 to. As I said, I've made rulings to the extent  
10 that I've been able to get through I think the  
11 first twenty minutes, so --

12 MS. SALTZ: And again, Your Honor, I  
13 apologize, it came as a surprise to me  
14 yesterday.

15 THE COURT: Ms. Saltz, not a problem at all.  
16 All right, let's take a short break. We'll be  
17 back at twenty of 3:00.

18 (Recess taken from 2:29 to 2:43 p.m.)

19 THE COURT: Please be seated. Mr. Crocenzi,  
20 would you call your next witness?

21 MR. CROCENZI: Yes, Your Honor, thank you  
22 Charles Kern.

23 THE COURT: I see that you already have.

24 MR. CROCENZI: We're ready to go.

25 (Charles Kern was called to testify and was

1 sworn by the courtroom deputy.)

2 COURTROOM DEPUTY: Please be seated and  
3 state your full name for the record.

4 THE WITNESS: My name is Charles Kern.  
5 Charles L. Kern.

6 DIRECT EXAMINATION BY MR. CROCENZI:

7 Q. Thank you, Your Honor. Mr. Kern, can you  
8 tell us who you're employed with?

9 A. Kern & Company, P.C.

10 Q. And how are you affiliated with that  
11 company?

12 A. I'm the chairman and CEO.

13 Q. I'm going to ask you some questions now  
14 about your background, Mr. Kern. Can you tell  
15 us where you went to college?

16 A. I got a bachelors degree from Penn State in  
17 1967. I received an MBA from Penn State in  
18 1969.

19 Q. What were your degrees in from Penn State?

20 A. My bachelors degree was in accounting, and  
21 my masters degree was in business  
22 administration.

23 Q. Have you received any additional training,  
24 degrees or anything of that sort since your MBA?

25 A. I have multiple professional



1     certifications. I have two in the area of  
2     valuing businesses, I have two in the area of  
3     forensic accounting, and I have a certification  
4     in estate planning.

5     **Q.** Okay. Can you describe forensic accounting  
6     for us, please?

7     **A.** There are many definitions floating around.  
8     The one I use that I like best at least is that  
9     you're trying to draw reasonable conclusions  
10    from incomplete data. For example, if a company  
11    had business interruption insurance and the  
12    facility burned to the ground, then along with  
13    their records and their insurance provided for  
14    lost profits how would you estimate those  
15    profits. That's dealing with things like  
16    embezzlement, usually a person who commits such  
17    a crime makes some effort that all the  
18    documentation and information is not there.

19    **Q.** Can you tell the jury what kind of  
20    employment you have had since your college?

21    **A.** Yes. When I was in college and graduate  
22    school at Penn State I worked for the summers in  
23    Philadelphia for an accounting firm that was  
24    then called Ernst & Ernst. It's now Ernst &  
25    Young. I started and worked full-time with

1 Ernst & Young when I got out of graduate school.

2 Q. What did you do when you first started at  
3 Ernst & Young?

4 A. I was an auditor. Then in the last several  
5 year I was there I was on there management  
6 consulting staff and I dealt with designing  
7 accounting and reporting systems. After Ernst &  
8 Ernst I moved back to this area, I was  
9 originally from the Harrisburg area and moved  
10 back in this area in 1977. I worked for three  
11 years as the controller at Lemoyne Sleeper  
12 Company, a local manufacturing firm. I then  
13 started Kern & Company. When I started Kern &  
14 Company I was on my own, and I also managed to  
15 have employment at that time that could pay the  
16 bills until the firm grew. I worked as  
17 full-time instructor at Penn State Harrisburg  
18 campus.

19 Q. What did you teach at Penn State?

20 A. At Penn State I taught intermediate  
21 accounting. I taught advanced accounting. I  
22 taught auditing. I taught advanced auditing.  
23 I taught corporate taxes. Those type of  
24 courses. I also when I was in graduate school  
25 I taught as part of my graduate assistantship,

1 I was teaching there.

2 Q. Now, since starting your own company what  
3 have you done at work?

4 A. Well, the firm is now 31 years old.

5 Fortunately it has grown over the years.

6 Probably today about 10 percent of our revenue

7 comes from the once a year individual tax

8 return. About half of the revenue comes from

9 small closely held business systems, helping

10 them with their financial systems, their taxes,

11 audit them for not for profit organizations.

12 The years of business valuation, litigation

13 support, forensic accounting, depending from

14 year to year the percentage varies, but it's

15 about between a third and 40 percent of our

16 business. I also taught courses for the

17 Pennsylvania Institute of CPA's, and I also

18 have taught courses for the Pennsylvania Bar

19 Institute.

20 Q. Now, you described for us what your company

21 does. What do you do on an individual basis at

22 Kern & Company?

23 A. Probably half my time or maybe more than

24 half of my time is the management of the

25 company. Most of my working time, billable time

1 if you will, has to do with the areas of  
2 business valuations, forensic and litigation  
3 support.

4 Q. Well, let's talk about litigation support.  
5 Have you ever testified before today in a trial?

6 A. Yes.

7 Q. How many times?

8 A. I can't remember because even in the early  
9 days of my career when I was at Ernst there were  
10 trials in which I testified. So I can't, it's  
11 forty years ago, so I can't remember.

12 Q. We're not going to fault you for that,  
13 Mr. Kern.

14 A. Probably --

15 Q. How about within the last five years?

16 A. The last five or ten years I believe it's  
17 three or four times.

18 Q. Do you also stay current with the  
19 accounting business by reading periodicals and  
20 publications?

21 A. Well, the certifications that I have all  
22 have with them requirements for continuing  
23 professional education. The requirements vary,  
24 but I would estimate that on average we need to  
25 keep about forty, at least forty hours a year

1 continuing education in different areas. I  
2 personally usually have about sixty or seventy  
3 hours a year.

4 Q. Do you also publish any articles in  
5 accounting or --

6 A. Yes, I have over the years published a lot  
7 of articles. Some were for a local regional  
8 construction magazine called *Builder Architect*.  
9 I have published lot of the articles in the  
10 *Central Penn Business Journal*, which is a  
11 regional business publication. I have published  
12 articles in a national publication called *Value*  
13 *Examiner* mostly to do with business valuations,  
14 and I have coauthored an article in what's  
15 called the *Journal of Forensic Accounting*.

16 Q. I'm going to show you a list of articles  
17 published. Did you produce this list as part of  
18 the report in this case?

19 A. I supplied you with the list. I don't  
20 think it was actually included in the report.

21 Q. All right, and does that list accurately  
22 spell out the publications you just testified  
23 about?

24 A. Yes.

25 Q. Do you go up to Penn State games?

1       **A.** well, I did until this year when they  
2 decided to double the price. I have my limits.

3       **Q.** All right. Now that you've explained to  
4 the jury who you are and what you do, I would  
5 like to talk to you or ask you some questions  
6 about your role in this case. Were you hired to  
7 look at or analyze Mr. Shaw's damages in this  
8 case?

9       **A.** Yes.

10       **Q.** And as part of that work what records or  
11 information did you review as part of your  
12 project?

13       **A.** We looked at -- do you have the report, a  
14 copy of it here?

15       **Q.** Sure.

16       **A.** Of course we reviewed the initial letter  
17 from you just providing information about the  
18 case. We read the complaint that was filed in  
19 the Middle District. We read the economic, the  
20 EEOC's dismissal of notice of rights for  
21 Mr. Shaw to litigate. We went through the  
22 website for the Social Security Administration  
23 to look at information about retirement dates  
24 and times. We went to the Federal Reserve  
25 Bank's website to get some information about

1 securities and investments. We had a work  
2 history for Mr. Shaw which he had provided to  
3 us. We looked at the payment, the checks,  
4 copies for the disability payments that Mr. Shaw  
5 received, and then we looked at the, what was  
6 called the personnel report for Mr. Shaw from  
7 the Cumberland Truck Equipment Company.

8 Q. Thank you. Now, Mr. Kern, after you  
9 reviewed that information can you explain to the  
10 jury what process you went through to analyze  
11 the potential damages for Mr. Shaw as a result  
12 of this case?

13 A. We looked at, we started with the data that  
14 was in the work history from the point of  
15 termination. We looked at the personnel report,  
16 which told us how much money per hour Mr. Shaw  
17 was making. We also I believe in the deposition  
18 of Mr. Sheldon and Mr. Whitmire there was  
19 discussion of types of cost of living  
20 adjustments and the rates that were given in the  
21 warehouse, and the years around the date of  
22 Mr. Shaw's termination, is it like 3 percent,  
23 3.8 percent.

24 So what we did, also Mr. Shaw was making  
25 voluntary contributions into his 401-K plan, or

1 6 percent, and Cumberland Truck Company was  
2 matching half of that. So we took Mr. Shaw's  
3 basic wage at the time, which was I think  
4 \$11.65. We did increase it for cost of living  
5 each year and calculated what he would be making  
6 each year in total from the date of his  
7 termination until the anticipated date of this  
8 trial. We also added to that the amount of the  
9 matching contribution for the 401-K, and then of  
10 course up to the point of today's trial he had  
11 received some short-term disability payment and  
12 we did subtract that from the amount that he  
13 would have earned.

14 From this point, meaning the approximate  
15 date of trial, we in a very similar way, in fact  
16 in an identical way calculated what Mr. Shaw  
17 would have earned with the annual 3 percent  
18 increase and the matching up to the point of his  
19 normal retirement date for social security  
20 purposes, which was I believe in April of 2018.  
21 Now, that represents the wages and the 401-K  
22 matches, the money that was, would have been put  
23 into the 401-K, both Mr. Shaw's contribution and  
24 the company's contribution, would have earned  
25 income filed in the 401-K, interest is earned



1 and that accumulates, so that was in both  
2 calculations as well.

3 From this point of the approximate trial  
4 date until the date of retirement, of course  
5 it's the future, so the question also comes up  
6 that if Mr. Shaw would prevail in these  
7 proceedings and receive the award how much money  
8 would he perhaps receive now so that he can be  
9 in the same economic position he would have been  
10 had he been employed through the term of the  
11 date, and of course the numbers that we were  
12 calculating are wages in the future. So that  
13 introduces the concept of the time value of  
14 money.

15 Q. And we're going to get into that a little  
16 later, but I just wanted you to give an overview  
17 of the methodology you went through.

18 A. That was the methodology, yes.

19 Q. So were there basically four areas that you  
20 looked at?

21 A. Yes.

22 Q. Lost earnings through date of trial, lost  
23 401-K through date of trial?

24 A. Right, 401-K earnings.

25 Q. Earnings, correct, and then future loss

1 earnings?

2 A. And future 401-K earnings.

3 Q. All right, great. Well, let's start with  
4 the first area that you testified about.

5 A. Okay.

6 Q. And before we go there I need you to take a  
7 look at that report, because it has been marked  
8 as a plaintiff's exhibit in this case, and I  
9 believe we're at P-16. You described your  
10 methodology, did you put that methodology in  
11 your figures and your computations in that  
12 report?

13 A. Yes, we did.

14 Q. And is it a true and accurate copy of the  
15 report that you have in front of you which is  
16 marked as P-16?

17 A. Yes, it is.

18 Q. And as part of that report did you attach  
19 exhibits to it that had basically the  
20 calculations that you went through to arrive at  
21 your final opinion?

22 A. Yes, we did.

23 Q. And did you have an Exhibit 2 that shows  
24 the calculation of lost earnings from date of  
25 termination or last day worked through day of

1 trial?

2 **A.** Yes.

3 THE COURT: Ms. Saltz, feel free to move  
4 around if you would like to see the exhibit.

5 MS. SALTZ: Thank you, Your Honor.

6 MR. CROCENZI: Mr. Kern, you're free to come  
7 down from the witness stand if that's okay with  
8 you, Your Honor, to point something out?

9 THE COURT: He has a portable microphone?  
10 Terrific.

11 BY MR. CROCENZI:

12 **Q.** Mr. Kern, can you identify this document  
13 please?

14 **A.** Let me see if I can get this hooked up  
15 first. Okay, can you hear me, folks? Thank  
16 you. This document is the calculation of  
17 earnings from 2-27-07 through the approximate  
18 date of the trial, which is May 15th. So as I  
19 mentioned to you, we took the hourly rate that  
20 Mr. Shaw was getting was \$11.65 an hour, and  
21 that went through both '07 and then we looked at  
22 each year, and then here we take the 11 up to  
23 the date of trial.

24 **Q.** Now, what was the percentage increase that  
25 you used for the hourly rate?

1       **A.** 3 percent. So the \$12 is 103 percent of  
2       \$11.65. This is 103 percent of the \$12 and 103  
3       percent of \$12.63 and the like.

4       **Q.** How many hours did you use in terms of  
5       calculating the number of work --

6       **A.** 40. We went to a calendar and determined  
7       the number of weeks that there would have been  
8       in each of those time periods, and then we  
9       calculated the amount of wage that Mr. Shaw  
10      would have earned, and the wages for all those  
11      periods, most of this, which are for these three  
12      or four years, was \$107,614.80. Mr. Shaw put 6  
13      percent, was putting 6 percent into his 401-K  
14      and the company was matching half of that.

15       So this is the 3 percent, we just took 3  
16      percent of the total, but it would've been 3  
17      percent each year. That's \$3,228 roughly. The  
18      total was \$110,843. As I think you've been  
19      informed he received some short-term disability,  
20      so we back that out, so we come up with  
21      \$97,116.54 as the lost wages and lost 401-K  
22      contributions through that date.

23      **Q.** Thank you. Now, the second part of your  
24      damage was the loss investment, right, for the  
25      401-K?

1       **A.** Yes.

2       **Q.** And I do not have a chart for that. So if  
3 you can either stand there if you wish and  
4 explain this or you can have a seat. Can you  
5 explain how you arrived at that number and what  
6 number you used?

7       **A.** Yes. Mr. Shaw was being paid as I recall  
8 every two weeks. So every two weeks there was  
9 money being withheld from his pay which was the  
10 401-K. Also there was a match. So you had  
11 these moneys that went into his 401-K plan into  
12 his account every pay period, and that started  
13 to have some kind of earnings as it went in.  
14 Now, what we did was we calculated the amount of  
15 interest. We calculated what that 401-K plan  
16 would have grown to over this period of years,  
17 telling us that in essence how much would have  
18 been in the 401-K plan. Then we subtracted from  
19 that the initial contribution, the difference  
20 being the amount that was earned over that  
21 period of time.

22       **Q.** What percentage did you use for the  
23 investment part of it?

24       **A.** Well, in the first part that you have,  
25 well, the whole part we used I think it was like

1 6.23 percent.

2 Q. If you need to refer back to your report,  
3 please do so.

4 A. Yes, 6.23 percent.

5 Q. Why did you use that number, Mr. Kern?

6 A. Well, Mr. Shaw was hired in July of the  
7 year 2000, and my job as I saw it was to come up  
8 with a reasonable estimate not only of the wages  
9 but also the amount that would have been earned  
10 in the 401-K. At the time Mr. Shaw was in his  
11 late 50's. So I believe that I myself am a  
12 little bit over 65, and I think when you get  
13 into your late 50's and 60's you start to think  
14 about the security of your retirement plan and  
15 the security of your investments.

16 At that time in the year 2000 one of the  
17 things, one of the types of investments or rates  
18 of return that we commonly look at in doing  
19 business valuation work, we deem U.S. government  
20 securities as being essentially risk free. In  
21 other words, there are all kinds of investments  
22 you can make. You can buy all kinds of stocks  
23 and you can buy all kinds of bonds, but  
24 everything has to fail before, generally it  
25 will fail before the government fails.

1 Now, there are investments that would earn  
2 more, and at that time you're talking about the  
3 year 2000 there was an economic boom. Also he  
4 was 58, and at that time there were U.S.  
5 treasury bonds, twenty year treasury bonds, and  
6 those treasury bonds were paying 6.23 percent.  
7 So a person could have invested in that kind of  
8 an investment, twenty years, and when they're in  
9 retirement, assuming they left the money in  
10 there, it would continue to grow.

11 Now, if those bonds are still out there and  
12 officially they pay 6.23 percent. Now, you all  
13 might think that boy, I'd like to buy one of  
14 those today, and you could. Now, you can't buy  
15 it from the government because that 6.23 percent  
16 was what the government was paying back on July  
17 10th of 2000. So if you knew somebody that had  
18 such a bond and you wanted to buy it from them  
19 so you could get the 6.23 percent, if they are  
20 knowledgeable about investments, say you wanted  
21 to buy for example \$10,000 worth, well, they  
22 wouldn't sell you a \$10,000 bond for \$10,000.  
23 They'd want perhaps \$12,000 or \$13,000 for it.  
24 So you'd get 6.23 percent from the government,  
25 but when that bond matured, you know, you'd get

1 the \$10,000, you wouldn't get the \$13,000 or  
2 whatever you paid for, it so that would equalize  
3 the earnings, but that's how we did that.

4 Q. And you have an exhibit in your report, if  
5 you want to go back and look at your report,  
6 please, Mr. Kern, that details that kind of  
7 calculation you have taken us through.

8 A. Yes.

9 Q. What exhibit is that to your report?

10 A. Mr. Crocenzi, you're talking about the  
11 earnings on the 401-K calculation?

12 Q. Yes, up through date of trial, correct.

13 A. Let me turn this off.

14 Q. You might -- okay, because you're going to  
15 be coming back down, but go ahead.

16 A. I didn't know if it might reverberate or  
17 something.

18 THE COURT: It might.

19 A. Now, the exhibit you're talking about is  
20 Exhibit 3.

21 Q. Now, this is going to pop up on your  
22 computer screen in front of you, Mr. Kern, and I  
23 think you're going to -- I am not going to have  
24 you read all this, but are those the  
25 calculations you went through to arrive at the



1 lost investment return on the 401-k?

2 A. Yes.

3 Q. And can you tell us what that number was  
4 after you did all these calculations?

5 A. \$1,315.67.

6 Q. Okay. A lot of calculations on one page.

7 A. Yes.

8 Q. I'm going to show you this board --

9 THE COURT: Mr. Crocenzi, I'm not exactly  
10 sure if we've officially offered him as an  
11 expert witness in this matter.

12 MR. CROCENZI: Okay.

13 THE COURT: And I want to make sure that  
14 Ms. Saltz has an opportunity for cross on  
15 qualifications if she would like.

16 MR. CROCENZI: Okay. I apologize.

17 THE COURT: I noted, you may have been doing  
18 that at the end and I just wanted to give her an  
19 opportunity to voir dire on qualifications.

20 MS. SALTZ: Your Honor, no voir dire on  
21 qualifications.

22 THE COURT: All right.

23 MR. CROCENZI: Thank you.

24 THE COURT: So you -- but if you would  
25 offer --

1 MR. CROCENZI: I'm going to offer him as an  
2 expert in forensic accounting, accounting for  
3 damages purposes.

4 THE COURT: All right. Any objection?

5 MS. SALTZ: No objections, Your Honor.

6 THE COURT: All right. The court accepts  
7 Mr. Kern as an expert in the fields offered by  
8 plaintiff.

9 MR. CROCENZI: Okay.

10 THE COURT: Now, ladies and gentlemen, I  
11 believe we'll have another expert witness. I'll  
12 give you more instructions at the end of the  
13 case about expert witness opinions, but for  
14 purposes of this testimony please be advised  
15 that the court has recognized Mr. Kern as an  
16 expert in his field of accounting that relates  
17 to the report that he is referring to, and I  
18 believe defense counsel will also have an expert  
19 offering an opinion. Is that correct?

20 MS. SALTZ: That is correct, Your Honor.

21 THE COURT: Okay.

22 BY MR. CROCENZI:

23 Q. Okay. We've covered two of the four areas,  
24 Mr. Kern, and I want to turn your attention to  
25 the third area, and that was the lost future

1 wage lost and 401-K contribution, is that right?

2 A. Yes.

3 Q. Now, did you produce an exhibit to your  
4 report detailing the calculations for that part  
5 of the damage?

6 A. Yes. Exhibit 4.

7 MR. CROCENZI: Ms. Saltz, I offer Exhibit 4.

8 MS. SALTZ: Thank you.

9 BY MR. CROCENZI:

10 Q. Mr. Kern, I've put on the board here an  
11 exhibit, actually is this a true and correct  
12 copy of Exhibit 4 from your report showing your  
13 calculations?

14 A. Yes, it is.

15 Q. And it looks very similar to the first  
16 exhibit that we went through with the lost  
17 earnings through date of trial. Can you explain  
18 to the jury the calculation?

19 A. Yes. The approach is in fact identical.  
20 If you go back to Exhibit 2 you'll see that in  
21 the year 2011 it's \$13.11 per hour.

22 Q. Okay.

23 A. This exhibit picks up from May 16th on and  
24 there is the \$13.11 per hour, and we did the  
25 same -- I lost my pointer. We did the same

1 process of increasing the hourly rate at 3  
2 percent, counted the number of weeks in the  
3 period, thirty-three weeks left this year.  
4 Mr. Shaw's retirement date for social security  
5 purposes, May 18th -- April 18th, rather, 2018.  
6 Forty hours a week. Did the calculations of the  
7 wages, again the 3 percent match, that's \$6,273.  
8 So the total lost wages, future lost wages, and  
9 matching 401-K contributions came to \$215,000.

10 Q. Okay. Now, when I stopped you earlier when  
11 you were giving us the overview of your scope of  
12 the work you mentioned something about present  
13 value calculations.

14 A. Yes.

15 Q. And is this where you did your present  
16 value calculations?

17 A. After this, yes, that's correct. Now, we  
18 did a -- I don't want to get ahead of myself,  
19 but we did a similar calculation for the lost  
20 earnings on the 401-K in that time period.

21 Q. Okay. Why don't we finish this part of,  
22 the third part --

23 A. I'm sorry.

24 Q. No problem. And before I -- well, why  
25 don't we do this. Put this up here, this is --

1 can you identify this for me, please?

2 A. Yes. That is Exhibit 6 from the report.

3 Q. What does this show?

4 A. It shows what we called the present value  
5 of the \$215,000 from the other exhibit. Now,  
6 just to give you an explanation of what we mean  
7 by present value, let's talk about what we call  
8 future value. Okay? I'm going to just give you  
9 an example, it's not based on any of these  
10 numbers, but for example if you were able to say  
11 invest \$2,000 today, and let's assume that you  
12 could find an investment that would grow or pay  
13 7.2 percent per year, and if you would make that  
14 investment with your \$2,000 and take the  
15 earnings and growth each year and left it in  
16 there, which means it's going to grow upon  
17 itself, which we call compounding, under those  
18 conditions, those ten years, in 7.2 percent your  
19 \$2,000 would have doubled. It would be \$4,000.

20 we call that \$4,000 if we're sitting here  
21 today on May 18th, or 16th, the \$4,000 is the  
22 future value of \$2,000 invested for ten years at  
23 7.2 percent. Now, the flip side of that coin is  
24 if somebody would come to us and say, you know,  
25 in ten years I'm going to give you \$10,000, and

1 you think gee, ten years is a long time away, I  
2 wonder what that's really worth today, because,  
3 you know, maybe you would like to have some  
4 money sooner. Well, the question is how much  
5 would they have to give you today that would be  
6 worth \$10,000, I mean \$4,000 in ten years.  
7 well, if we made the assumption that a fair  
8 return or a discount rate was 7.2 percent, the  
9 present value of that \$4,000 in ten years is  
10 \$2,000.

11 Q. Is there some kind of accounting formula  
12 that you used to determine that value?

13 A. well, it's not just for accounting but it's  
14 calculation of present value, and you can find  
15 formulas that will work the other way to give  
16 you the future value.

17 Q. All right. So let's take us through  
18 Exhibit 6 and give us the actual numbers that  
19 you were working with for Mr. Shaw.

20 A. Okay. well, here's the \$215,000, which if  
21 you remember was the number on the prior  
22 exhibit. Now, we needed an interest rate, or if  
23 you will a discount rate, and I used, we used  
24 3,39 percent. Now, the reason where we got  
25 that, we're sitting here in 2011, and Mr. Shaw

1 if he had continued to work, again his normal  
2 retirement date is 2018, and again I wanted to  
3 say what would an investor if they wanted to,  
4 because he's older now and we're older now, and  
5 he wants to really secure his principal, where  
6 might he go to make an investment. So I went  
7 back to the notion of the treasury bond because  
8 they're deemed to be very secure, and I looked  
9 at a ten year treasury bond, because that would  
10 carry us from today through his retirement date,  
11 and now, or at least at the date we had closest  
12 to May 16th, the ten year treasury bonds were  
13 paying 3.39 percent.

14 So we adjust if you will, calculated the  
15 present value or backed down from that \$215,000,  
16 the theory being that if the present value we  
17 came up with was \$170.317. So if one had that  
18 amount of money today and decided to put it into  
19 treasury bonds, a ten year treasury bond at 3.39  
20 percent, they'd end up with roughly that  
21 \$215,000.

22 Q. Now, you then did the fourth part of your  
23 calculation, and that was the lost earnings?

24 A. Earnings on the 401.

25 Q. Future 401-K?

1       **A.** Yes.

2       **Q.** Not to belabor the point, but I think we  
3       can just take a look at your report, Mr. Kern,  
4       in an exhibit that we have that would show that  
5       calculation. Can you identify what exhibit that  
6       would be in your report?

7       **A.** That would be Exhibit 5.

8       **Q.** And I'm showing you on this screen, is that  
9       Exhibit 5 from your report that you just  
10      referenced?

11      **A.** Yes, it is.

12      **Q.** And again there are quite a few  
13      calculations there, but can you at least take  
14      us briefly through the steps if they were any  
15      different than what you just explained to the  
16      jury about the lost future wage loss?

17      **A.** Well, the approach on this exhibit is  
18      exactly the same as the one on Exhibit 3 where  
19      we calculated the lost earnings on the lost  
20      wages up to the date.

21      **Q.** Okay.

22      **A.** So we used the same, actually the same  
23      approach, and the, we're saying in this case,  
24      this is a little bit fuzzy, but I'll read from  
25      my paper document.



1 Q. Yeah, that would be better, thank you.

2 A. The total value in that 401-K at April  
3 18th, 2018, we computed an estimate of \$23,210,  
4 but in that same period of time, you know, the  
5 amount that would have been Mr. Shaw's and the  
6 company's contribution was \$18,819. So the lost  
7 future earnings on the 401-K is the \$4,391.

8 Q. And we see that at the bottom of your  
9 exhibit?

10 A. Yes.

11 Q. Now, Mr. Kern, based on -- let me ask you  
12 this. I meant to ask you about the last  
13 exhibit, and that is why did you use Mr. Shaw's  
14 date of retirement based on the information you  
15 obtained from the Social Security  
16 Administration?

17 A. Well, I made the assumption that he would  
18 retire at least from Cumberland Truck at the  
19 normal retirement date. Some people retire  
20 early because they can or want to or have to.  
21 Other people work longer than that.

22 Q. Okay.

23 A. My retirement date is coming up next year,  
24 but I'm going to be working longer.

25 Q. Okay.

1       **A.** I like it.

2       **Q.** And, Mr. Kern, did you then reach a  
3 conclusion based on a reasonable degree of  
4 forensic accounting standards of the lost  
5 earnings and investments and wages that you  
6 have just explained to us?

7       **A.** Yes, I did.

8       **Q.** And is that summary or conclusion contained  
9 in your report?

10      **A.** Yes, it is.

11      **Q.** What page is that on, please?

12      **A.** 2.

13      **Q.** Mr. Kern, I'm showing you the last exhibit  
14 here. Now, does this part of the section pulled  
15 from your report that you testified contain the  
16 summary of your work?

17      **A.** Yes, it is.

18      **Q.** All right, and can you just then go through  
19 with the jury what these numbers, how they --  
20 where you got them from and how they tie  
21 together?

22      **A.** Well, in the earlier exhibits where we  
23 looked at the lost wages up through the trial  
24 date, the lost wages and the 401-K from that  
25 exhibit was \$97,116, and we said that the

1 earnings on the 401-K for that same period was  
2 \$1,315. A couple of minutes ago we looked at  
3 the calculation of the present value of the  
4 \$215,000 on that exhibit, it was \$170,000, and I  
5 just read from exhibit, I forget the number, I  
6 think it was 4, the earnings on the 401-K on the  
7 future and it was \$4,000 something I believe,  
8 and the present value of that was the \$3,472.  
9 So the lost wages and 401-K benefits totalled  
10 \$267,000. The lost earnings on the 401-K were  
11 \$4,007, for a total loss of \$272,222.

12 MR. CROCENZI: Thank you. No further  
13 questions.

14 THE COURT: Mr. Crocenzi, if you don't mind  
15 moving the easel? Cross examine?

16 CROSS EXAMINATION BY MS. SALTZ:

17 Q. Thank you, Your Honor. Mr. Kern, you  
18 prepared three reports in this matter, correct?

19 A. Yes, that's right.

20 Q. And your most recent report is dated April  
21 29th, 2011?

22 A. Yes.

23 Q. And in that report and as you just advised  
24 the jury you calculate a total loss equal to  
25 \$272,222?

1       **A.** That's correct.

2       **Q.** In coming to your estimate of the economic  
3 loss you relied on assumptions, isn't that true?

4       **A.** Yes.

5       **Q.** And the assumptions you rely on become the  
6 foundation of your estimate, correct?

7       **A.** Yes.

8       **Q.** Now, you have to make certain assumptions  
9 with regard to earning capacity after the  
10 separation, which is how much Mr. Shaw would  
11 have made each year with Cumberland Truck  
12 Equipment.

13       **A.** Yes.

14       **Q.** And you have to make certain assumptions  
15 about Mr. Shaw's earning capacity given the  
16 separation, which is how Mr. Shaw could make an  
17 alternate employment. Do you want me to say  
18 that one again, because I'm getting a little  
19 tongue tied.

20       **A.** Yeah, I don't think I understood your  
21 question.

22       **Q.** You have to make certain assumptions about  
23 Mr. Shaw's earning capacity given the  
24 separation, which is how much he would have  
25 earned if he had alternative employment.

1       **A.** No, my assumption was how much he would  
2       have earned if he continued as an employee of  
3       Cumberland Truck.

4       **Q.** Now, you have to make certain assumptions  
5       with regards to Mr. Shaw's work life, which is  
6       how long he would have expected to work,  
7       correct?

8       **A.** That's correct.

9       **Q.** Then you have to make assumptions as to how  
10      those earnings would have changed over time to  
11      account for inflation and present value?

12      **A.** Not account for inflation, but just account  
13      for the increases in his wages, which  
14      historically have been 3 percent.

15      **Q.** And when you make all these assumptions,  
16      which are the foundation for your estimate, you  
17      want to rely on the most exact data that you  
18      can, isn't that true?

19      **A.** Certainly about his initial wages, yes.

20      **Q.** So the more exact and precise the data you  
21      rely on the more accurate your assessments would  
22      be?

23      **A.** I'm not sure what you mean by accurate  
24      data.

25      **Q.** Correct data. Data that we know that has

1     been confirmed and verified.

2         **A.** Yes. Right.

3         **Q.** Okay. Let's discuss your assumptions  
4     regarding Mr. Shaw's work life expectancy.

5         **A.** Uh-huh.

6         **Q.** And you assume that Mr. Shaw would have  
7     worked to age 66. True?

8         **A.** I think that's what it is, yes.

9         **Q.** And you chose this age because it's a the  
10    point when Mr. Shaw would be eligible for full  
11    social security benefits, isn't that true?

12        **A.** That's correct.

13        **Q.** Now, you would agree with me that not  
14    everyone works until the full social security  
15    retirement age, isn't that true?

16        **A.** Correct. Some people work longer, like me.

17        **Q.** And some people work shorter?

18        **A.** Yes.

19        **Q.** Okay. Now, if I represent to you that  
20    Mr. Shaw's statistical work life expectancy is  
21    to age 64.2, you wouldn't have any reason to  
22    disagree with me, would you?

23        **A.** Repeat that, please.

24        **Q.** Okay. If I represent to you that his  
25    statistical work life expectancy is to age

1 64.2 --

2 A. Well, I think the Social Security  
3 Administration got their expected numbers from  
4 somewhere, so if you gave me a number, if the  
5 Social Security Administration thinks a person  
6 is going to work until 66 or 67, and your  
7 numbers are different, I wouldn't automatically  
8 assume that your numbers are correct, no.

9 Q. So you're relying solely on what social  
10 security says then?

11 A. Yes, I did.

12 Q. Now, so based on the statistical work life  
13 data, by doing what you did in relying solely on  
14 social security you've overvalued the economic  
15 loss but narrowly two years then.

16 A. No, I haven't. That's a hypothetical  
17 situation. I made my calculation based upon him  
18 working until normal retirement age. You know,  
19 he could have died and he would have earned  
20 less. He could have gotten, you know, who  
21 knows? There's all kinds of reasons why a  
22 person might work more or less than the normal  
23 retirement age.

24 Q. Health reasons play into that, too, right?

25 A. Of course.

1 Q. Let's discuss your assumptions you relied  
2 upon regarding residual earning capacity. Now,  
3 you do not value any residual earning capacity,  
4 correct?

5 A. I don't know what you mean by residual  
6 earning capacity.

7 Q. Well, the residual, in fact if you make,  
8 you don't make any mention. Do you know what  
9 residual earning capacity is, sir?

10 A. I just asked you to explain it to me.

11 Q. Well, I'm not the accountant, sir.

12 A. And that's not an accounting concept.

13 Q. Okay. Now, your total loss figure of  
14 \$272,222.16 assumes that Mr. Shaw will never be  
15 employed again, isn't that correct?

16 A. I'm sorry? Repeat that.

17 Q. Your total loss figure of \$272,222.16 --

18 A. Yes.

19 Q. -- assumes that Mr. Shaw will never be  
20 employed again, isn't that true?

21 A. It's my estimate of what he, yes. Right.

22 Q. Right, because you didn't take away for  
23 anything that he could have earned --

24 A. Correct.

25 Q. -- assuming he got employment?



1       **A.** That's correct.

2       **Q.** Okay. Now, he also, Mr. Shaw receives  
3 social security disability benefits, doesn't he?

4       **A.** Yes.

5       **Q.** And are you familiar with the social  
6 security disability benefits program?

7       **A.** I know it exists, yes.

8       **Q.** Are you aware that social security only  
9 pays benefits to individuals who are totally  
10 disabled?

11       **A.** I know they have disability payments, yes.

12       **Q.** And are you aware that in order to be  
13 granted social security disability benefits an  
14 applicant's condition must interfere with basic  
15 work related activity?

16       **MR. CROCENZI:** Objection, Your Honor. If we  
17 could have a side bar on this I'd appreciate it  
18 because I think it's going to --

19       **THE COURT:** Yes, we should have a side bar.

20       (Side bar at 3:31 p.m.)

21       **MR. CROCENZI:** My objection is that the  
22 questions are assuming that the information is  
23 correct. It's a legal question. We brought  
24 this up in the motion in limine and I think it's  
25 unfair to be able to ask this witness legal

1 questions she's posing to him.

2 THE COURT: Well, I'm not sure the last  
3 question was a legal question. What concerns me  
4 is confusion on the part of the jury where they  
5 may be conflating social security disability  
6 benefits with a determination of liability in  
7 this case. So that's my sort of overarching  
8 concern. What is it specifically, Ms. Saltz,  
9 that you're going to get into with respect to  
10 the expert's opinion about social security  
11 disability?

12 MS. SALTZ: Well, we have two problems with  
13 the way the two issues come in. On the first  
14 end with social security we now know based on  
15 Mr. Shaw's testimony that his disability date  
16 goes back to February 22nd, 2007. So with the  
17 assumption being that he is not working and is  
18 disabled, then there is no loss. The second  
19 problem is that Mr. Kern didn't take into  
20 account for any mitigation of working, you know.

21 THE COURT: Right. Mitigation is a --  
22 you've addressed that and if you want to address  
23 it again that's fine, but mitigation is not a  
24 problem. It's the social security disability  
25 issue, and your point is that --

1 MS. SALTZ: You can't have it both ways is  
2 my point.

3 THE COURT: -- if he is disabled then he  
4 would not have been entitled to receive --

5 MS. SALTZ: Correct.

6 THE COURT: -- wages.

7 MS. SALTZ: Correct. You can't have it both  
8 ways, and that's the problem with his report is  
9 that all he's have done is he hasn't committed  
10 to one or the other but has simply said taking  
11 from the date of when he, you know, the  
12 separation date and carried it through to age 66  
13 and says this is his loss and his 401-K. So I  
14 think it's proper cross examination based on his  
15 own assumptions in this report.

16 THE COURT: All right. Mr. Crocenzi?

17 MR. CROCENZI: Mr. Kern is not a lawyer, and  
18 I believe Ms. Saltz is making a legal argument  
19 that because social security found him disabled,  
20 therefore he's considered totally disabled and  
21 not be able to receive any kind of wage loss in  
22 this matter, and I think if she asks Mr. Kern  
23 why didn't he take into consideration the social  
24 security disability determination, he will say  
25 that is a legal issue and I am not addressing

1 legal issues, I'm not a lawyer, and I think  
2 that's what I had a problem with. She's cross  
3 examining him on legal concepts that this  
4 witness is not qualified to answer.

5 MS. SALTZ: The problem, Your Honor, is  
6 that --

7 MR. CROCENZI: That's why we brought it up  
8 in the motion in limine.

9 MS. SALTZ: Mr. Kern in his report did not  
10 take into account social security benefits based  
11 on collateral estoppel. He is not an attorney  
12 and that is a legal conclusion, but to leave it  
13 out there that Mr. Shaw would be entitled to  
14 this income stream from date of separation  
15 without a, is in conflict with the fact that  
16 he's testified that he was found disabled at the  
17 disability date.

18 THE COURT: Well, why can't you simply ask  
19 him you have not taken into consideration the  
20 fact that he was identified as disabled as of  
21 February 27th. Is that --

22 MR. CROCENZI: Right.

23 MS. SALTZ: And could I do the next question  
24 then if he had he taken that he would not have  
25 been able to, he would not be recovering --

1 MR. CROCENZI: That goes into the legal  
2 issue at that --

3 THE COURT: I think he said that directly  
4 impacts on the dollar amount that you've  
5 calculated.

6 MS. SALTZ: I'm just not sure the jury is  
7 going to get that he then get nothing.

8 THE COURT: I'm not sure that he would get  
9 nothing because there certainly is a distinction  
10 between the amount of the social security  
11 benefits and, you know, there's certainly a  
12 difference between what you receive in  
13 disability benefits and what you could earn if  
14 you were working on a full-time basis as  
15 Mr. Shaw was prior to the benefits application.  
16 Right? So I guess it's more the issue --

17 MS. SALTZ: Right.

18 THE COURT: -- that he did not take into  
19 consideration in his calculations the fact that  
20 there was a, there were social security  
21 disability benefits paid. My concern is that if  
22 we --

23 MS. SALTZ: I understand.

24 THE COURT: If you attempt to pigeon hole  
25 this witness into his view of whether you can

1 recover both disability benefits and work loss  
2 that the jury is going to somehow get confused  
3 by this.

4 MS. SALTZ: I think I have a way that I can  
5 handle both issues and go into another line of  
6 questioning. I think certainly what I can do is  
7 essentially say as I said to Your Honor you  
8 didn't take into account social security, and  
9 you also didn't take into account the fact that  
10 he could be gainfully employed and you can't  
11 have it both ways, you just left him going  
12 forward, and then leave it at that and then go  
13 right into the mitigation issue.

14 MR. CROCENZI: I think you've already  
15 addressed the mitigation.

16 MS. SALTZ: I have a ways to go on that.

17 THE COURT: Okay. It's cross examination,  
18 I'm going to give her an opportunity to explore  
19 mitigation, but with respect to the piece about  
20 social security disability, are you, do you have  
21 a comfort level with what she has suggested.

22 MR. CROCENZI: I have a comfort level with  
23 asking him did he take into consideration the  
24 social security disability determination. He  
25 will say no, and I think that's where it should

1 end, and then she can --

2 THE COURT: She could also ask him so you  
3 didn't take into consideration that, and then  
4 get into the issue of mitigation.

5 MS. SALTZ: Mitigation.

6 THE COURT: All right. I think we're good.

7 MS. SALTZ: Thank you.

8 THE COURT: Thank you.

9 (Side bar concluded at 3:38 p.m.)

10 THE COURT: Ladies and gentlemen, I believe  
11 that Ms. Saltz is going to rephrase her  
12 question, and so we'll start anew. Ms. Saltz?

13 BY MS. SALTZ:

14 Q. Yes, Mr. Kern. Thank you, Your Honor. You  
15 did not give any consideration to social  
16 security in your assumptions or calculations for  
17 your bottom line, is that true?

18 A. I did not reduce the loss calculation --

19 Q. I'm not talking about the benefit, sir.  
20 I'm talking about the overall set -- you  
21 testified you really didn't give, you didn't  
22 consider social security disability in this?

23 A. Well, in my report I cite that we did not  
24 offset the amount by, the loss by the social  
25 security benefit.

1 Q. And also, sir, you did not in your report  
2 take into consideration or make any assumption  
3 as to Mr. Shaw's capability of returning to some  
4 form of alternative employment, did you?

5 A. I was asked to calculate his loss based  
6 upon the assumption that he was not able to  
7 return to work because of what happened to him,  
8 so --

9 Q. And no other employment?

10 A. Correct.

11 Q. Okay. I'm going to ask you then, sir, that  
12 to assume certain facts, assume that Mr. Shaw  
13 was able to return to some form of employment,  
14 and further assume that he was capable of  
15 working a full forty hour work week at this  
16 employment. Now, you would agree with me that  
17 the minimum wage in Pennsylvania is currently  
18 \$7.25 an hour?

19 A. I believe it is.

20 Q. And assuming a full-time forty hour per  
21 week schedule, this would result in earnings of  
22 \$15,080 per year?

23 A. That sounds approximately right.

24 Q. And your estimate of Mr. Shaw's annual  
25 earnings with Cumberland is approximately



1 \$25,000 per year, isn't that true? You can look  
2 through your report if you need to, sir.

3 A. Yes.

4 Q. Okay, and that \$15,000 is 60 percent of  
5 \$25,000, isn't that correct?

6 A. Yes.

7 Q. So if Mr. Shaw can return to some alternate  
8 employment, he would at least generate earnings  
9 equal to 60 percent of that which he received at  
10 Cumberland?

11 A. I consider that hypothetical and  
12 speculative. He may find employment where he  
13 could make a lot more or as I've assumed he may  
14 not be able to find employment at all.

15 Q. Okay, but --

16 A. But I calculated the loss based upon the  
17 assumptions that I've stated, not some  
18 hypothetical situation.

19 Q. That's why I'm offering this hypothetical.  
20 Then taking what you just said --

21 A. Well, hypothetically anything could happen.

22 Q. I understand, Mr. Kern, but you just said  
23 in fact he could make more.

24 A. No, I didn't say he could make more. I  
25 said it's possible, hypothetically it's

1 possible. Anything is possible.

2 Q. Let's hypothetically then assume that he  
3 was able to return to alternate employment and  
4 he was making \$10 an hour. This would represent  
5 approximately \$20,000 a year, and that \$20,000  
6 is 80 percent of that \$25,000, correct?

7 A. Yes.

8 Q. So if Mr. Shaw could return to work at an  
9 hourly wage of \$10 an hour, he could recoup 80  
10 percent of his expected earnings with the  
11 company?

12 A. Again you're asking for me to make a  
13 conclusion based on a hypothetical situation and  
14 I just will not do that.

15 Q. You're comfortable with just simply saying  
16 that from the date of employment to age 66 this  
17 is what his lost earnings are?

18 A. Correct, under the --

19 Q. With no mitigation?

20 A. Under the assumptions that are in my  
21 report, that's correct.

22 Q. And let's discuss another one of your  
23 assumptions. How about the wage inflation  
24 present value? Present value means bringing  
25 future dollars back to today's dollars, correct?

1       **A.** Right.

2       **Q.** And to do that you have to grow by a  
3       certain amount, earnings growth, and then  
4       reduced to present value by a certain amount,  
5       discount rate, correct?

6       **A.** That's right.

7       **Q.** Now, you assume future wage increases of 3  
8       percent annually?

9       **A.** Yes.

10      **Q.** And you also assume a 3.9 annual discount  
11      rate?

12      **A.** 3.39 I think, but yes.

13      **Q.** And that results in approximately a .39 net  
14      discount rate, correct?

15      **A.** I'd have to do the math. That's not  
16      necessarily correct because you're looking at  
17      different time periods, but that's the  
18      difference between those two numbers, yes.

19      **Q.** Okay, but if you used for example 3 percent  
20      wage increase and a 5 percent discount rate,  
21      that would result in an approximate 2 percent  
22      net discount rate?

23      **A.** Again if you, and if I used a 5 percent  
24      discount rate, if I used a 1 percent discount  
25      rate, these are all hypothetical situations.

1 I told you that my 3 percent discount rate is  
2 based on investment in ten year U.S. treasury  
3 bonds, which I consider to be a risk free  
4 investment, and that's why I thought that was  
5 the appropriate number to use and that's what I  
6 used.

7 Q. Are you finished?

8 A. Yes.

9 Q. If I told you that from 1990 to 2010 the  
10 average wage growth in the U.S. economy was 3.17  
11 and the average yield on a high grade municipal  
12 bond was 5.25 percent for the same time period,  
13 you would agree that the result is approximately  
14 a net discount rate of 2.02 percent?

15 A. If you're asking me if your math is  
16 correct, it sounds correct.

17 Q. But if you're using a .39 net discount rate  
18 compared to a 2 percent net discount rate you're  
19 yielding --

20 A. I'm not using a 3.9 net discount rate. At  
21 least -- I'm not using a net discount rate. I  
22 used a rate at which his, or a prudent  
23 investment, the rate at which a prudent  
24 investment could have grown.

25 Q. So in essence --

1       **A.** Then I calculated the present value of the  
2       future loss based upon the rate that again a  
3       prudent investment at this time would yield.  
4       I didn't net two.

5       **Q.** So the bottom line is, sir, that you simply  
6       accepted the social security age full retirement  
7       age and looked at the fact of when Mr. Shaw left  
8       employment and would retire at age 66 and  
9       carried that through without any mitigation at  
10      all for other employment?

11      **A.** Correct.

12      MS. SALTZ: I have no further questions.

13      THE COURT: Any redirect?

14      REDIRECT BY MR. CROCENZI:

15      **Q.** Mr. Kern, I do have a couple of questions.  
16      I want you to assume for purposes of this  
17      question had CTE, Cumberland Truck, not told  
18      Ricky to go home and stop working, how would  
19      that have affected your calculation?

20      **A.** would you repeat your question, sir?

21      **Q.** If CTE had not separated Ricky from  
22      employment --

23      **A.** Right.

24      **Q.** -- would that have affected your  
25      calculation?

1       **A.** If they had not separated him from  
2       employment? When I talked to Mr. Shaw he, I do  
3       know that he told me that he liked his job there  
4       and would work there as long as he could have.

5       **Q.** And has anything that Ms. Saltz shared with  
6       you on cross examination, all these numbers she  
7       was throwing at you, change your opinions that  
8       you gave during direct examination?

9       **A.** No. I think that a wise investment in the  
10      year 2000, secure investment, U.S. treasury  
11      bonds, paying 6.23 percent, and if he would  
12      receive an award from this proceeding, concerned  
13      about security of retirement, you know, I'm not  
14      a financial planner but I'd say to him this is a  
15      risk free investment and that's, if it were me  
16      that's where I'd put my money.

17      **Q.** Mr. Kern, we spent a lot of time going over  
18      your qualifications as an expert in this matter.  
19      You have no legal education?

20      **A.** No.

21      **Q.** Do you have a law degree?

22      **A.** No.

23      **Q.** And you were asked why you didn't take into  
24      consideration the social security disability  
25      determination. Can you tell the jury why you

1 didn't do that as part of your analysis in this  
2 case?

3 MS. SALTZ: Objection, Your Honor.

4 THE COURT: I think we've addressed this at  
5 side bar. I don't think that's necessary. The  
6 objection is sustained.

7 MR. CROCENZI: No further questions. Thank  
8 you.

9 THE COURT: And, Mr. Kern, I'm not sure if  
10 this was asked, but you're offering all of your  
11 opinions to a reasonable degree of accounting  
12 certainty, is that correct.

13 THE WITNESS: That is correct, and I did  
14 include that in my report.

15 THE COURT: Very well.

16 MR. CROCENZI: Regarding the report, Your  
17 Honor, I would move for its admission into  
18 evidence, along with all the supporting  
19 exhibits, publications, and so forth that were  
20 acquired.

21 THE COURT: All right, I'm not sure that  
22 would necessarily be admitted for purposes of  
23 deliberations, but into the record any  
24 objection, Ms. Saltz?

25 MS. SALTZ: Into the record no objections,

1 but I agree not with regard to deliberations.

2 THE COURT: All right, very good. It is  
3 admitted.

4 MR. CROCENZI: Thank you.

5 THE COURT: And I have no further questions,  
6 Mr. Kern. You may step down.

7 THE WITNESS: Thank you.

8 THE COURT: Mr. Crocenzi or Mr. Russo, any  
9 additional witnesses?

10 MR. CROCENZI: No additional witnesses, Your  
11 Honor. We do have one housekeeping matter  
12 regarding the transcript from the deposition of  
13 Tim Kline. If you recall we had to clean up  
14 some version before it was read and we do have a  
15 copy for the court reporter so he didn't have to  
16 type the questions and answers as they were  
17 being read on the stand.

18 THE COURT: Very good, and is that marked as  
19 an exhibit? Why don't we mark it --

20 MR. CROCENZI: It's P-17, Your Honor.

21 THE COURT: All right, very good. Any  
22 objection to the admission of P-17?

23 MS. SALTZ: No, Your Honor, no objection.

24 THE COURT: All right. It is admitted.  
25 And with that does the plaintiff rest?



1 MR. CROCENZI: Yes, Your Honor.

2 THE COURT: All right. Ladies and  
3 gentlemen, I have a couple of matters I need to  
4 address with counsel. We will take a short  
5 break. I do except that we may run a little  
6 past 5:00 today. I'm hopeful that we can get at  
7 least one defense witness in this afternoon, and  
8 so for that purposes stay with us and we'll get  
9 back to you as soon as we can. We're in recess  
10 until I think 4:15. That's my best estimate.  
11 Ms. McKinney, you may escort the jury.

12 (Jury recessed at 3:50 p.m.)

13 THE COURT: Please be seated. Ms. Saltz,  
14 you have a Rule 50 motion.

15 MS. SALTZ: Yes, Your Honor. The defense  
16 moves under Rule 50 for a directed verdict at  
17 this time. I would just like to begin with the  
18 social security aspect of it that in this case  
19 the plaintiff by virtue of his own admissions in  
20 the application to social security admitted that  
21 he lost his job due to his inability to bend  
22 based on his knee and back under OSHA  
23 requirements, and as a result of that and also  
24 indicating the other areas in which that he's  
25 not able to work, and more importantly the fact

1 that he did admit that he lost his job because  
2 he was not able to do his job duties, has failed  
3 to offer an explanation as to why he falls  
4 within the American with Disabilities Act at  
5 that point and that judicially estopped him from  
6 the protection of the ADA.

7 Putting that aside, recognizing that it is  
8 to some degree, there's also another issue with  
9 regard to that, and this also goes to the main  
10 part of the case as well. An element of this  
11 case requires plaintiff's proof of requesting  
12 reasonable accommodation, and understanding the  
13 conflict sometimes between the ADA and social  
14 security, social security does not take into  
15 account whether an individual can work with or  
16 without accommodation while the ADA does take  
17 that into account.

18 In this case the difficulty here is the  
19 fact that there has been no evidence by  
20 Mr. Shaw's own admission that he was able to  
21 work with accommodation or requested  
22 accommodation. The evidence in the case has  
23 been by virtue of medical evidence as well as by  
24 his own admission that he is not able to meet  
25 the physical requirements of his job and never

1 would have been able to meet the physical  
2 requirements even after the knee replacement.

3 Therefore there is no question that for the  
4 jury to determine whether or not he requested  
5 reasonable accommodation, that was denied to him  
6 in one aspect, and further there has been  
7 absolutely no evidence of retaliation in this  
8 case, which is also one of Mr. Shaw's claims.  
9 In addition to that this case was brought by  
10 Mr. Shaw as a regarded as case, and under a  
11 regarded as disabled case it's not enough that  
12 Mr. Shaw has, and I'm trying to just find my  
13 paperwork here, it's not enough that he, you  
14 know, it's not enough for an employer to observe  
15 an employee that has an impairment.

16 It requires that the employee -- I found it  
17 here -- has to establish in this case the two  
18 elements, the two activities, life activities  
19 that plaintiff has brought this case under is  
20 walking and working. Now, the working activity,  
21 it's plaintiff's burden to demonstrate that the  
22 employer perceived or regarded him disabled from  
23 a broad class of jobs. Not his particular job.  
24 There has been absolutely no evidence in this  
25 case by the plaintiff that Cumberland Truck

1 Equipment Company regarded or perceived him as  
2 disabled from an entire class of jobs.

3 As to walking, the fact that Cumberland  
4 observed Mr. Shaw having some difficulty walking  
5 is insufficient to establish a regarded as  
6 aspect of the claim. In fact, when Mr. Shaw  
7 testified, his opinion is or his belief was that  
8 because the company offered him a company  
9 benefit available to him whether he needed it,  
10 if he needed it, was their perceiving him as  
11 disabled. There has been no evidence that  
12 Cumberland Truck Equipment Company, which is  
13 again the perceptions of the people he worked  
14 with and management, perceived him as disabled  
15 in any way.

16 That evidence has never come out in this  
17 case and therefore based on that he does not  
18 fall under the protection of the ADA absent that  
19 evidence. There's also the issue of whether  
20 he's qualified, another element that has to be  
21 met, and again qualified with or without  
22 accommodation. well, in this case we have his  
23 own physician as testified to by Mr. Shaw saying  
24 that he could not carry, lift, walk, stand, and  
25 that he could only do a sedentary sit down only

1 job, is that he was not qualified with or  
2 without accommodation, and he can't meet that  
3 element of the claim.

4 THE COURT: All right. I'm comfortable  
5 enough on the Rule 50 motion with respect to  
6 these other claims. Speak to the retaliation  
7 issue if you would, please.

8 MS. SALTZ: Well, the retaliation issue is  
9 based solely on the fact that according to  
10 plaintiff that Mr. Shaw made a request for  
11 accommodation, and I'm not exactly sure how  
12 plaintiff takes this out and I'm going to make  
13 this assumption that because he requested  
14 accommodation and the company didn't accommodate  
15 him and then retaliated against him by not  
16 allowing him to come back to work and then  
17 terminating his employment. That's my  
18 understanding of where the retaliation claim  
19 comes in based on plaintiff's pretrial memo  
20 and --

21 THE COURT: And where does it fail in your  
22 mind?

23 MS. SALTZ: It fails in my find in that  
24 first of all Mr. Shaw by his own admission did  
25 not make a request for accommodation. He never

1 requested it. The one area that plaintiff has  
2 brought out in this case is that he requested to  
3 have his job modified, but then admitted that  
4 there was nothing to modify as far as the  
5 duties, admitted that the physical requirements  
6 were what the physical requirements were, and  
7 further admitted that, you know, he never asked  
8 them to modify any of the physical requirements,  
9 he never asked them to modify anything, for them  
10 to consider him to allow him to continue in his  
11 job based on their judgment that he could not do  
12 his job, which was based on a medical opinion  
13 for which there is also case law, and my trial  
14 brief certainly lists also law that I'm relying  
15 on in this case, and I'll refer to that.

16 So the problem here is that if you have  
17 plaintiff himself admitting that no, he did not  
18 specifically ask -- well, first of all we have  
19 two aspects to this. We have to look at just  
20 before the exam and after the exam. The  
21 testimony is clear by Mr. Shaw. He never  
22 advised them of any medical condition and never  
23 requested any accommodation. We now have him  
24 submit to a medical exam to determine, which at  
25 that point based on the unrefuted testimony no

1 one knew what his condition was and whether he  
2 could do the job or not do the job, which is why  
3 he was sent to the medical exam. After he went  
4 to the medical exam and he failed that medical  
5 exam, he came back and requested that he be  
6 fired, laid off, left to do his job  
7 notwithstanding the medical opinion, and to  
8 modify his job description to what he really  
9 did.

10 That was what plaintiff's focus was on,  
11 that that was the "accommodation" he was  
12 requesting. The problem is that to support both  
13 his direct testimony and on cross examination  
14 Mr. Shaw admitted that there was nothing to  
15 modify. Those were his assigned duties. Those  
16 were the physical requirements of his duties,  
17 and that he never went to Cumberland Truck  
18 Equipment at any point after that exam with  
19 either restrictions from his own physician, with  
20 either requesting that he be given time to take  
21 a break throughout the day, not have to lift a  
22 certain amount of weight, whatever, something  
23 concrete on which the company could determine  
24 whether that was reasonable or not.

25 THE COURT: Okay. I think I understand the

1 basis of your motion. Who would like to  
2 respond? I think the one distinction that I  
3 would like between your argument in support of a  
4 Rule 50 motion in favor of the defendants and  
5 the request for accommodations is the job  
6 analysis and what you're describing is the  
7 admissions of Mr. Shaw is that there's clearly  
8 two different interpretations of the job  
9 analysis and the physical requirements of the  
10 job.

11 Mr. Whitmire on the stand specifically said  
12 that the lifting of 150 pounds occasionally was  
13 with assistance and that the frequent lifting of  
14 75 pounds was with assistance, and it's also  
15 clear to me that Dr. Walker and those who were  
16 evaluating Mr. Shaw in the context of those job  
17 descriptions and the nature of the specific  
18 duties that a warehouseman is required to  
19 perform, we have a major distinction.

20 Dr. Walker is operating under an assumption that  
21 is materially different than a supervisor at the  
22 defendant's employer.

23 So your argument would be an excellent  
24 argument but for the fact that we have a very  
25 clear factual issue about what this job really



1     entailed and was Mr. Shaw, was he able to do the  
2     job that was required of him pursuant to the  
3     company's job description. So in other words  
4     it's that interpretation of the job. If you  
5     want to speak to that?

6           MS. SALTZ: Just very briefly. The problem  
7     with that, Your Honor, is while I understand  
8     Your Honor's position that there is, there could  
9     be an issue of fact with regard to that, I think  
10    Mr. Shaw's testimony was very clear. But  
11    putting that aside, we don't get to  
12    accommodation until Mr. Shaw can establish the  
13    first element that he is a disabled individual  
14    under the Americans with Disabilities Act, and  
15    we don't have the evidence there to get him  
16    there because under that he has to be either  
17    disabled or regarded as disabled, and there's no  
18    evidence that anyone regarded him as disabled.

19           THE COURT: All right, and there we just  
20    plainly disagree with respect to the scope of  
21    the evidence. I think there's plenty of  
22    evidence in here that he was regarded as  
23    disabled by virtue of the manner in which he was  
24    treated both before and after the initial  
25    examination. I'm going to deny the Rule 50 in

1 all respects for the reasons that I have stated  
2 on the record. I believe that in order to  
3 prevail on his first claim he must prove that  
4 CTE prevented him from working because it  
5 regarded him as disabled, requiring him to prove  
6 by a preponderance of the evidence, first that  
7 he had a disability within the meaning of the  
8 ADA; second, that he was a qualified individual,  
9 able to perform the essential functions of the  
10 job; and third, that his perceived disability  
11 was a motivating factor in CTE's decision to  
12 engage in adverse employment action.

13 In order to prevail on his second claim,  
14 that is that CTE failed to provide a reasonable  
15 accommodation, Mr. Shaw must prove all the  
16 following by a preponderance of the evidence.  
17 First, that he has a disability within the  
18 meaning of the ADA; second, that he is a  
19 qualified individual, able to perform the  
20 essential functions of the job; third, that CTE  
21 was informed of the need for an accommodation  
22 for Mr. Shaw due to a disability, and for that  
23 specific issue I think that is clear both from  
24 the letter of February 28th, 2007 and also from  
25 the accommodations that are mentioned within the

1 scope of the medical records; fourth, providing  
2 that the accommodation at issue would have been  
3 reasonable; and fifth, that CTE failed to  
4 provide the accommodation at issue or any other  
5 reasonable accommodation.

6 Then finally to prevail on his third claim,  
7 that CTE retaliated against him, he must prove  
8 by a preponderance of the evidence first that he  
9 engaged in a protected activity; and second,  
10 that CTE subjected him to a materially adverse  
11 employment action at the time or after the  
12 protected conduct took place; and third, that  
13 there was a causal connection between CTE's  
14 adverse employment action and his protected  
15 activity. I have considered the arguments of  
16 counsel and all the evidence, and I find that a  
17 reasonable jury could have a legally sufficient  
18 evidentiary basis to find in favor of Mr. Shaw  
19 on all claims.

20 So in light of these evidentiary showings  
21 the court will deny defendant's Rule 50 motion  
22 for judgment as a matter of law. I know that  
23 we're going to try to get in Dr. Staller this  
24 afternoon. Approximately how long do you  
25 anticipate his testimony? I have the jury

1 prepared to stay a little bit longer. I'm  
2 hoping that, I know that he's from Philadelphia  
3 and he probably would like to get back to  
4 Philadelphia, but I obviously want to give you  
5 sufficient time to place your case into the  
6 record.

7 MS. SALTZ: His testimony is not very  
8 long. Well, the problem is time to get through  
9 qualifications. I mean, we could probably --  
10 then we have cross examination. Is there any  
11 chance we could do Dr. Oplinger at this point,  
12 or is that, does Your Honor need more time with  
13 regard to the objections? Because we're ready  
14 to move with that depending on the  
15 court's ruling.

16 THE COURT: I'm sorry, I just need more time  
17 to review the objections. I was inclined to  
18 rule in favor of some and against others, and  
19 in order to have that properly organized I think  
20 we need to start with Dr. Staller, and then to  
21 the extent that he's not finished, well,  
22 unfortunately, Dr. Staller, we'll have to bring  
23 you back, but let's see how far we can get with  
24 him. All right?

25 MS. SALTZ: All right. Thank you.

1 MR. CROCENZI: My cross should not be very  
2 long, Your Honor.

3 THE COURT: All right, let's take a break  
4 until 4:15. If you need a little more time than  
5 that, that's fine.

6 MS. SALTZ: Thank you.

7 THE COURT: Thank you.

8 (Recess taken from 4:05 to 4:20 p.m.)

9 THE COURT: Please be seated. Ladies and  
10 gentlemen, we've finished the plaintiff's case  
11 in chief, and now it's time to turn to the  
12 defense and ask if you have any witnesses that  
13 you would like to present on behalf of  
14 Cumberland Truck Equipment Company. Ms. Saltz?

15 MS. SALTZ: I do, Your Honor, and thank you.  
16 I would like to call at this time Chad Staller  
17 to the stand.

18 THE COURT: Good afternoon, Mr. Staller.  
19 If you would please step forward, and the  
20 courtroom deputy will administer the oath.

21 (Chad Staller was called to testify and was  
22 sworn by the courtroom deputy.)

23 COURTROOM DEPUTY: Please be seated and  
24 state your full name for the record.

25 THE WITNESS: Chad Lawrence Staller,

1 S-T-A-L-L-E-R.

2 DIRECT EXAMINATION BY MS. SALTZ:

3 Q. Do you happen to have your CV in front of  
4 you or do you need a copy?

5 A. I don't, but I know it pretty well.

6 Q. I'll give you an extra one. Where do you  
7 work?

8 A. I work at the Center For Forensic Economic  
9 Studies.

10 Q. And could you please describe to the court  
11 and the jury what is your occupation, sir?

12 A. I'm a forensic economist.

13 Q. And, Mr. Staller, in today's society we  
14 hear a lot about forensics, *CSI* especially.  
15 Could you please describe what is a forensic  
16 economist?

17 A. Yes, from *CSI* and *Law & Order* there's a  
18 funny vision of today of what forensics is.  
19 Lab coats, blue lights. I don't have any of  
20 that. Really the term "forensic" comes from the  
21 Latin *foren*. *Foren* just means public forum. So  
22 what I do is apply economics in the public  
23 forum, which is here at the courthouse.

24 Q. Now, what does your daily work consist of,  
25 sir?

1       **A.** I provide economic analysis in different  
2 types of legal matters. So such as an  
3 employment case as we're here today, motor  
4 vehicle accidents, professional liability, any  
5 time there's been some type of claimed  
6 interruption to future losses, I provide  
7 analysis as to what that economic impact is.

8       **Q.** And who do you provide these services for?

9       **A.** Both plaintiff and defense law firms.

10       **Q.** And would you please describe to the jury  
11 your educational background, sir?

12       **A.** Yes. I received my bachelors in economics  
13 from Lehigh University. After Lehigh I then  
14 went to Temple University and received my J.D.  
15 with honors, my law degree with honors. A few  
16 years later I went back to the Fox School of  
17 Business at Temple University and I received my  
18 masters of business administration with honors.  
19 At that time Temple's basketball program was not  
20 that good, so I went over to Villanova and  
21 received a masters of accounting degree. At  
22 that time they had the better basketball  
23 program, and now both are just in the pits. So  
24 I did a little tour of the Delaware Valley  
25 schools.

1 Q. Now, sir, are you a member of any  
2 professional societies?

3 A. Yes, I am.

4 Q. Could you tell the jury which ones?

5 A. I'm a member of NACVA, which stands for the  
6 National Association of Certified Valuation  
7 Analysts. It's a private organization that gives  
8 expert types additional training in business  
9 valuations.

10 Q. And can you describe any teaching or  
11 lecturing you have done?

12 A. I lecture at Temple University School of  
13 Law, also Villanova School of Law, and one of  
14 the requirements in many states for practicing  
15 lawyers is to get continuing legal education.  
16 Each year they have to get so many credits of  
17 current updates or continuing education with  
18 regard to current issues in the law. I'm a  
19 frequent lecturer to various law firms and  
20 lawyers with regard to the calculation of  
21 damages in various types of cases.

22 Q. Are those legal societies that you've  
23 addressed on economics?

24 A. Yes, correct.

25 Q. And have you published any articles in



1 professional journals?

2 A. Yes, I have.

3 Q. Can you tell the jury which ones?

4 A. I've published, I can't recall the exact  
5 ones, various articles with regard to the  
6 calculation of damages in various legal  
7 journals.

8 Q. And have you been called upon before to  
9 testify in court as an expert?

10 A. Yes, I have.

11 Q. And in what courts have you testified as an  
12 expert?

13 A. Various state courts throughout  
14 Pennsylvania, Maryland, New Jersey. Federal  
15 courts in Maryland, New Jersey, Pennsylvania,  
16 New Hampshire, New York.

17 MS. SALTZ: Your Honor, at this time I would  
18 like to offer Mr. Staller as an expert in the  
19 area of forensic economics and lost earnings  
20 analysis.

21 THE COURT: Any questions of qualifications?

22 MR. CROCENZI: No, Your Honor.

23 THE COURT: Any objections to the offer?

24 MR. CROCENZI: No.

25 THE COURT: All right. The court will

1 accept Dr. Staller in the fields offered by  
2 counsel for the defendant.

3 BY MS. SALTZ:

4 Q. Thank you, Your Honor. Now, is it Doctor  
5 staller?

6 A. It's a J.D., so just mister. But I like  
7 the doctor sound.

8 Q. Now, Mr. Staller, were you retained by my  
9 law firm?

10 A. Yes, I was.

11 Q. And completed an assignment for me?

12 A. Yes, I did.

13 Q. Before we get into the specifics of your  
14 opinion can you tell the jury what documents you  
15 reviewed to conduct your analysis?

16 A. Sure. I reviewed the complaint, which is  
17 just a legal document in the case that gets the  
18 case started. It sets forth the general facts,  
19 lay of the land. I reviewed answers to  
20 interrogatories from the plaintiff. These are  
21 just written answers to written questions that  
22 are signed under oath by Mr. Shaw. I reviewed  
23 various deposition transcripts from various  
24 witnesses that are statements under oath. The  
25 primary one for me was the deposition of

1 Mr. Shaw. Mr. Shaw's w-2's from the years 2000  
2 through the year 2008, and I had an opportunity  
3 to review two of Mr. Kern's reports.

4 Q. Through your analysis have you determined  
5 the total economic loss as a result of  
6 Mr. Shaw's separation of employment on September  
7 17th, 2007?

8 A. Yes, I have.

9 Q. Are all the opinions you're about to  
10 provide within a reasonable degree of economic  
11 certainty?

12 A. They are, yes.

13 Q. And, Mr. Staller, what is the economic loss  
14 to Mr. Shaw as a result of his separation of  
15 employment in September of 2007?

16 A. The total economic loss would be \$9,601.

17 Q. And, Mr. Staller, you were here in the  
18 courtroom when Mr. Kern was testifying?

19 A. Yes, I was.

20 Q. And his estimate clearly of loss is quite  
21 different than yours. Could you explain to the  
22 jury your analysis and why your figures differ  
23 from Mr. Kern's figures?

24 A. Yes. You heard from Mr. Kern, his loss had  
25 quite a few more zeros than my estimate. The

1 primary difference comes from the fact that I  
2 analyzed this from Mr. Shaw's ability to work in  
3 the labor market. Going back to September -- or  
4 February 26th of 2007, Mr. Shaw went out on  
5 short-term disability. In November 21st, 2007  
6 Mr. Shaw sought social security disability.  
7 Ultimately that award of social security  
8 disability was awarded to Mr. Shaw. Under the  
9 requirements of social security disability there  
10 are certain declarations or certain statements  
11 being made by Mr. Shaw.

12 He's declared to the Social Security  
13 Administration that he can no longer perform his  
14 job and he can no longer participate in the  
15 labor market. Once that declaration has been  
16 made and it's been reviewed by the Social  
17 Security Administration and then was actually  
18 ultimately approved, which was Mr. Shaw  
19 testified to today that he began receiving  
20 disability payments in March of 2008, he's no  
21 longer participating in the labor market, and in  
22 light of that the earnings stopped.

23 So given the fact that he's been deemed  
24 disabled by a government administrative body,  
25 they reviewed the documents, he's no longer

1 participating in the labor market. In light of  
2 that my loss stops and that's a significant  
3 difference. Mr. Kern's goes out as he indicated  
4 to 2018 and he looks at \$11.65 an hour growing  
5 at 3 percent. My \$9,600 comes from the \$11.65,  
6 but only from February 26th to November 21st of  
7 2007. At that point Mr. Shaw made that  
8 application for disability under the terms of  
9 social security, and I can provide them to you  
10 today, this is coming from the Social Security  
11 Administration, the definition comes from the  
12 fact that you cannot do work that you did  
13 before. Your disability has lasted or is  
14 expected to last at least one year or result in  
15 death.

16 It goes on to state that is your condition  
17 severe, your condition must interfere with basic  
18 work related activities for your claim to be  
19 considered. His answer goes on to state that if  
20 it does not we will find that you are not  
21 disabled. This is the Social Security  
22 Administration. It goes on to say if your  
23 condition does interfere with basic work related  
24 activities, we proceed and we do an analysis.  
25 Once they find that his limitation is severe and

1 it interferes with your ability to do that work,  
2 then you're deemed disabled. In light of their  
3 finding the loss stops, and that's why my  
4 calculation gets him \$9,600.

5 Q. Now, let's assume for the moment, put aside  
6 social security. Now, you heard Mr. Kern  
7 testify that all he did was take the time period  
8 from the separation and carrying it through to  
9 age 66.

10 A. That's correct.

11 Q. Now, do you agree with that assumption of  
12 going to age 66 based on social security, simply  
13 on social security?

14 A. I do not.

15 Q. And why is that, sir?

16 A. Historically social security actually  
17 started at age 65. Once Congress and the Social  
18 Security Administration found out that we were  
19 going to run out of funds they have continually  
20 shifted the age later and later. Actually  
21 currently you could get your social security  
22 benefits starting at age 70 if you do not elect  
23 to get them at your social security age of 66 or  
24 67. These ages are almost arbitrarily placed by  
25 Congress and the Social Security Administration.

1 In the field of economics and forensic  
2 economics there's a concept called statistical  
3 work life. Just like everyone here as a  
4 statistical life expectancy which is based upon  
5 certain probabilities, there's something called  
6 statistical work life based on certain  
7 probabilities, and one of the things that  
8 Mr. Kern mentioned today was, you know, work  
9 life to age 66 does not account for the  
10 probability of death or disability.

11 That's exactly what statistical work life  
12 does. These are private studies that examine  
13 individuals' participation in the labor market  
14 based upon their age and education level and  
15 sex. For Mr. Shaw he would have a statistical  
16 life age 64. So in essence by relying upon a  
17 generic age of 66 for social security, you're  
18 statistically overstating the economic loss.  
19 Again as Mr. Kern said you could go longer, you  
20 could go shorter, and that would be guessing,  
21 but we have data, we have empirical data that  
22 says if you go on statistical data you're going  
23 to age 64.

24 Q. Okay. Now, let's take a looked at, let's  
25 put aside society security now for the time

1 being, all right? I'm going to ask you to  
2 assume a hypothetical assuming facts. Assume  
3 that Mr. Shaw did not apply for social security.  
4 In taking that assumption, and you heard  
5 Mr. Kern's testimony, is there some mitigation  
6 of damages in terms that have to take place as  
7 far as his finding other employment and how that  
8 works with the numbers?

9 **A.** Yes. From an economic concept that's  
10 called mitigation. Mitigation is reducing your  
11 damages or, you know, if you have exposure of a  
12 hundred dollars, how do you go make sure that  
13 hundred dollar loss is not complete, how do you  
14 get back in this case, in this sense, how do you  
15 get back into the labor market and how do you  
16 recover some earnings, and we do that here by  
17 getting other employment.

18 So if we hold aside for the second that he  
19 did not get or seek social security disability  
20 benefits, he should have at that time been  
21 seeking other employment, and that other  
22 employment would be able to reduce the damages  
23 that were presented by Mr. Kern.

24 **Q.** And based on your review of the records, if  
25 he could work, do you know when he stopped



1 searching for a job?

2 A. I do. In his deposition he stated he has  
3 not sought any employment since January of 2008.

4 Q. And, sir, are you referring to your report?

5 A. Yes, I am.

6 MS. SALTZ: Just for the court's  
7 verification that's Defendant's Exhibit 44.

8 THE COURT: Thank you.

9 BY MS. SALTZ:

10 Q. You also heard during my examination my  
11 presenting some numbers to Mr. Kern.

12 A. I did, yes.

13 Q. So assume that Mr. Shaw can work and he's  
14 earning at least minimum wage. How would  
15 Mr. Kern's estimate change based on that?

16 A. At minimum wage that accounts for earnings  
17 of \$15,080 a year. Assuming that Mr. Shaw would  
18 have not sought social security disability and  
19 removed himself from the labor market but got a  
20 minimum wage job, and I start this in January  
21 1st of 2009, the economic loss would change from  
22 that 269 figure to \$129,517.

23 Q. And how about if he started work and earned  
24 \$10 per hour?

25 A. \$10 an hour the earning projection would be

1 \$20,800 per year. That further reduces what the  
2 total economic loss would be. In that case the  
3 total economic would be \$76,607.

4 Q. All right. Now, also with regard to growth  
5 rates for 401-K, you heard Mr. Kern's testimony  
6 in that regard. Do you agree with him?

7 A. I do not. I would disagree.

8 Q. And why is that?

9 A. During Mr. Kern's testimony he said he went  
10 back to the twenty year treasury bond that was  
11 in effect in 2000. 2000, or July of 2000 is  
12 right before the first recession of this, or the  
13 former decade, and he came up with a twenty year  
14 treasury bond of 6.23 percent. If we're looking  
15 at contributions, and Mr. Kern went all through  
16 the fact that in each year 2011, 2012, each year  
17 that Mr. Shaw would have worked he would have  
18 made contributions to his 401-K.

19 I agree with that. However, what I  
20 disagree with is the rate of return those  
21 dollars would have gotten. Those figures  
22 projected by Mr. Kern were based upon  
23 investments as he stated in 2000. If you look  
24 at exact same piece of data that Mr. Kern relied  
25 on but using current investment rates the twenty

1 year treasury as of January of 2011, four months  
2 ago, five months ago, it's two points less. So  
3 it would be 4.37 percent. And what that does is  
4 it changes the projection of loss 401-K benefits  
5 or lost interest income because now we're  
6 growing the principal, how much money that's  
7 growing into the future, at 4.2 percent versus  
8 6.23 percent, which is more realistic of the  
9 economic horizons.

10 Q. Now, the fact is, and again just very  
11 briefly, but assuming based on the facts of loss  
12 that, you know, Mr. Shaw has deemed under the  
13 social security as being disabled.

14 A. Yes.

15 Q. Using that as the assumption, he would not  
16 then not have sustained a loss, correct?

17 A. Correct. So ultimately his determination  
18 of disability from the Social Security  
19 Administration goes back to February 26th of  
20 2007, and getting those funds from that date and  
21 time there really would be zero economic loss.

22 Q. And my question to you, sir, is and there's  
23 of course nothing to determine based on  
24 mitigation of damages other than the fact of the  
25 minimum wage of \$10 to say that he would then be

1 working or having to look for work?

2 A. Correct. If he happened to look for work,  
3 which again is different from the facts because  
4 he sought disability instead of looking for  
5 work, but if he looked for work at a minimum  
6 getting reemployed based upon the term minimum  
7 wage, we know he'd be making \$15,000 a year  
8 approximately.

9 Q. So my question to you, Mr. Staller, is you  
10 still came up with this loss of \$9,601?

11 A. Yes.

12 Q. Could you explain to the jury how you  
13 arrived at that based on your explanation just  
14 now?

15 A. Really it was a generous projection to  
16 suggest the fact that maybe he wasn't disabled  
17 until the time he sought disability, and he  
18 sought the disability application on November  
19 21st of 2007, which is then his ultimate  
20 declaration or statement through his paperwork  
21 that "I'm disabled, I'm not able to do my job or  
22 able to participate in the labor market." what  
23 social security ultimately found was his  
24 disability goes back to the day, what the  
25 initial report of Dr. Walker, which goes back to

1 February 26th of 2007. If he was deemed  
2 disabled from that date there really is no  
3 economic loss in this case, but in an event of  
4 conservatism I provided an estimate for those  
5 seven months.

6 Q. That covers that from --

7 A. February.

8 Q. -- February 26th to November 21, less  
9 short-term disability payments?

10 A. That is correct.

11 Q. Now, Mr. Staller, are all the opinions that  
12 you have given to a reasonable degree of  
13 economic certainty?

14 A. Yes, they are.

15 MS. SALTZ: I have no further questions,  
16 Your Honor.

17 THE COURT: Okay. Thank you, Ms. Saltz.  
18 Cross examine?

19 MR. CROCENZI: Thank you, Your Honor.

20 CROSS EXAMINATION BY MR. CROCENZI:

21 Q. Mr. Staller, you're in the business of  
22 providing expert reports, is that correct?

23 A. Yes.

24 Q. That's what your company does, that's how  
25 it earns revenue?

1       **A.** We provide analysis and often times the  
2 results in writing reports, yes.

3       **Q.** And you have other people in your firm that  
4 do the same thing as you do, provide expert  
5 reports for attorneys?

6       **A.** That's correct.

7       **Q.** You also testified that you have testified  
8 in other cases before. Do you remember  
9 providing a list of the cases you have testified  
10 in in the last five years prior to providing  
11 your report in this case?

12       **A.** I think it would be to the last four years.

13       **Q.** Four years, okay. Do you remember  
14 providing that report of the cases?

15       **A.** In this matter?

16       **Q.** Yes.

17       **A.** I believe I did. I don't have a strong  
18 recollection, but I'm sure I did it.

19       **Q.** All right. I counted the cases and you  
20 testified in fifty trials. Does that sound  
21 right?

22       **A.** In the last four years?

23       **Q.** Yes.

24       **A.** That sounds about right.

25       **Q.** And you also gave a deposition thirty-three

1 time, is that right?

2 A. If your math is correct on the sheet I have  
3 no reason to disagree.

4 Q. All right, and a deposition is when as you  
5 said somebody, a witness like yourself, an  
6 expert witness is put under oath and there's a  
7 court reporter taking down testimony and there's  
8 a transcript like this made of your testimony,  
9 is that right?

10 A. Well, yes, with the exception I don't think  
11 it's limited to experts. I think it's with any  
12 witness in a case.

13 Q. And when you gave a deposition you were  
14 testifying as an expert based on a report you  
15 produced for an attorney, is that right?

16 A. That's correct.

17 Q. You also gave two affidavits during that  
18 same time period regarding the expert matter, is  
19 that correct?

20 A. If that's what my list says I have no  
21 reason to disagree with you.

22 Q. And an affidavit is a written document  
23 where you are indicating that you are giving the  
24 information to the best of your knowledge based  
25 on the penalties of perjury, is that right?

1       **A.** I think that's a fair definition, yes.

2       **Q.** Thank you, and you were hired by Ms.  
3       Saltz's law firm in this case to provide an  
4       expert report for her?

5       **A.** Yes, I was.

6       **Q.** Did you charge Ms. Saltz's law firm a fee  
7       for your services?

8       **A.** I'm sure I did.

9       **Q.** Do you know how much that was?

10       **A.** I don't know the total fee but I could tell  
11       you my hourly rate.

12       **Q.** What is your hourly rate?

13       **A.** It's \$350 an hour.

14       **Q.** And do you also charge to be in court today  
15       to give your testimony?

16       **A.** Yes, I do.

17       **Q.** Is that separate from the hourly rate?

18       **A.** It is, yes.

19       **Q.** What is that rate?

20       **A.** That's a \$2,500 for the day.

21       **Q.** Do you know how many hours you've put in in  
22       this case?

23       **A.** I don't know.

24       **Q.** You didn't check before you came here?

25       **A.** I did not.



1 Q. So you put some time into reviewing all  
2 those documents you talked about earlier,  
3 correct?

4 A. Yes.

5 Q. And you put some time into formulating your  
6 analysis of the case, correct?

7 A. I did.

8 Q. And you put some time into drafting your  
9 report, right?

10 A. Yes, I did.

11 Q. Did you also take time to prepare to  
12 testify today?

13 A. Yes, I did.

14 Q. Any estimate based on what we've gone  
15 through now of how many hours you may have put  
16 into this case leading up to today's trial?

17 A. I couldn't give you an estimate, but I can  
18 let Ms. Saltz know. I'm sure it's a fair and  
19 reasonable time.

20 Q. An economist is different from an  
21 accountant, is that correct?

22 A. I would agree so.

23 Q. Right. You have different educational  
24 backgrounds, an accountant has a certain set of  
25 educational requirements and an economist has

1 another set of educational requirements?

2 A. Possibly. It depends if the accountants  
3 are getting their CPA's and depending, but I'm  
4 sure there's some overlap but there would be  
5 also some distinction, yes.

6 Q. I read your report and listened to your  
7 testimony today, and your conclusion is that  
8 since Social Security Administration found that  
9 Mr. Shaw would qualify for social security  
10 disability benefits, that his wage loss in this  
11 case should stop. Is that right?0 that's  
12 basically the guts of your opinion today?

13 A. That would be my primary opinion, yes.

14 Q. In looking at your report the definition  
15 that you gave to the jury for the Social  
16 Security Administration determination is from  
17 the Social Security Administration website, is  
18 that correct?

19 A. It is, yes.

20 Q. I don't see anything else in your report  
21 that you cited to such as a regulation, is that  
22 right?

23 A. I did not cite to a regulation.

24 Q. Can you explain to the jury what a  
25 regulation is?

1       **A.** Generally, you can probably correct me, but  
2 my definition of a regulation would be a  
3 promulgation or a rule set forth by an  
4 administrative body.

5       **Q.** And since you're a lawyer wouldn't you  
6 agree that a regulation is legally binding and  
7 that courts and parties can cite to a regulation  
8 for support in their position, is that right?

9       **A.** I can't say that it would be legally  
10 binding, but I can say that again it's an  
11 issuance by an administrative body.

12       **Q.** And wouldn't you agree based on your legal  
13 training, Mr. Staller, that lawyers can cite to  
14 regulations in support of their legal positions.  
15 That's an acceptable resource to consult, is  
16 that right?

17       **MS. SALTZ:** Objection, Your Honor. I'm not  
18 sure exactly where this line of questioning is  
19 going. I mean, he's here as an economic expert,  
20 not here as an attorney.

21       **MR. CROCENZI:** Your Honor, he has given  
22 basically a legal opinion and I'm I think  
23 entitled to --

24       **THE COURT:** It is cross examination. I'm  
25 going to give him some leeway on this. The

1 objection is overruled.

2 MR. CROCENZI:

3 Q. And, Mr. Staller, I don't see anything in  
4 your report where you cited to any cases from  
5 judges in support of your opinion, is that  
6 right?

7 A. I did not provide any case law for my  
8 opinions, no.

9 Q. All right, and as a lawyer you're aware  
10 that courts issue decisions, right?

11 A. That's part of their role and job, yes.

12 Q. Okay, and lawyers rely upon those court  
13 decisions to support their legal positions, is  
14 that right?

15 A. I would agree with that, sure.

16 Q. And it's what we call precedent, meaning  
17 that when a court issues a decision we're to be  
18 bound by that decision unless there's some  
19 difference that we can cite, is that right?

20 A. That's an accepted definition of  
21 precedence.

22 Q. And I didn't see any statute that you cited  
23 in your report for your opinion. Can you tell  
24 the jury what a statute is?

25 A. It's a law that has been codified into --

1 that's probably a bad definition. Codified law  
2 that has been set forth by the legislature and  
3 that has been approved.

4 Q. So it's a law passed by Congress or a state  
5 legislature, is that right?

6 A. I'd agree with that.

7 Q. Okay. Good. So the only support you have  
8 in your report for your opinion is a website, is  
9 that right?

10 A. Right, that's created and maintain by the  
11 administrative body, the Social Security  
12 Administration, yes.

13 Q. And is your opinion that because the Social  
14 Security Administration found Mr. Shaw to  
15 qualify for social security disability that he  
16 is therefore I think you said totally disabled  
17 based on your review of this website? Is that  
18 my understanding?

19 A. Well, my review would be that social  
20 security has deemed Mr. Shaw totally disabled  
21 and it's not my finding.

22 Q. Okay, but you're basing it upon that  
23 website that you cited to, right?

24 A. Right, again the administrative agency's  
25 website that publishes for the American public.

1 Q. And are you aware that the United States  
2 Supreme Court is the highest court in the land?  
3 You learned that in law school?

4 A. I remember that fact.

5 Q. Okay, good, and have you ever read a case  
6 from the United States Supreme Court called  
7 Cleveland vs. Policy Management Systems  
8 Corporation?

9 MS. SALTZ: Objection, Your Honor.

10 THE COURT: Basis?

11 MS. SALTZ: Again it's -- I mean, this is a  
12 determination for in terms of the law, he's  
13 testified as to an assumption with regard to  
14 what disability provides in the social security  
15 in a calculation as to economics. Now we're  
16 going into --

17 THE COURT: He's addressing I think one of  
18 the foundations for that opinion. I think it's  
19 fair cross examination. I'll allow it and I'm  
20 also going to give you an instruction on the  
21 relationship between social security disability  
22 benefits and the Americans with Disabilities Act  
23 that will hopefully clarify this. I'm going to  
24 allow some of this, Mr. Crocenzi, but really the  
25 determination of law is for the court. The jury

1 is to determine the facts. You can attack this  
2 presumption, but, ladies and gentlemen,  
3 recognize that anything that's related to  
4 statements of law have to ultimately come from  
5 the court, and the court's description of the  
6 law is what controls and should control your  
7 deliberations when you apply that law to the  
8 facts as you find them to be. Mr. Crocenzi,  
9 I'll give you a little more leeway.

10 BY MR. CROCENZI:

11 Q. Thank you. Have you read the Cleveland  
12 case?

13 A. I have not.

14 Q. Are you aware of the Cleveland case in  
15 general?

16 A. Not beyond the last ten seconds when you  
17 just presented the case name to me.

18 Q. Okay, and are you aware that the United  
19 States Supreme Court in that case said that just  
20 because the Social Security Administration deems  
21 a person disabled for social security disability  
22 purposes doesn't mean that they're disabled for  
23 purposes of the Americans with Disabilities Act?  
24 would you like to read the case? would you like  
25 me to cite to you where court said that?

1       **A.** Well, if you read it correctly I would not  
2 disagree with your reading of it if you did it  
3 correctly.

4       **Q.** Okay. Have you read any cases from the  
5 United States Third Circuit on this issue?

6       **A.** I have not.

7       **Q.** And can you tell the jury if you know how  
8 the United States Third Circuit fits into the  
9 judicial system?

10       **A.** In the federal court system, I'd have to  
11 defer to Your Honor, there's nine circuits, ten.  
12 The states are divided into various circuits.  
13 The third circuit is, Pennsylvania sits in the  
14 Third Circuit along with New Jersey, and  
15 Delaware I believe also set sits in the Third  
16 Circuit. After the Third Circuit then you go  
17 up to the Supreme Court and those other  
18 circumstances.

19       THE COURT: We also claim the Virgin  
20 Islands.

21       **A.** Oh, that's right.

22       THE COURT: Believe it or not.

23       **Q.** And have you read an opinion from the Third  
24 Circuit called Turner vs. Hershey Chocolate?

25       **A.** I have not.



1 Q. Are you aware of that case in general based  
2 on your experience as an expert testifying in  
3 these matters?

4 A. I am not.

5 Q. Do you know what employment Mr. Shaw looked  
6 for after Cumberland Truck told him to stop  
7 working on February 26th, 2007?

8 A. According to his deposition from what I  
9 recall he went to a couple of temporary job  
10 placement organizations. My recollection of his  
11 deposition testimony was that he went to two or  
12 the three I believe temporary job placements.  
13 One was JTC maybe, and then I think there was  
14 one or two others that he applied with.

15 Q. Okay. So you're aware that Mr. Shaw did  
16 look for employment, correct?

17 A. Minimally, yes. I mean, according to the  
18 deposition, his deposition was in January of  
19 2010, sought disability or was put on short-term  
20 disability in February of 2007. February, so in  
21 three years two or three places is minimal  
22 search effort.

23 Q. Well, do you know when he applied for those  
24 jobs after Cumberland Truck told him to stop  
25 working?

1       **A.** I don't recall the specifics in the  
2 deposition, but by virtue of fact it would be  
3 between February of 2007 and January 10th of  
4 2010.

5       **Q.** And isn't it true based on your review of  
6 the deposition transcript that Mr. Shaw was not  
7 offered any employment, correct?

8       **A.** From the two entities that he put his name  
9 with that is correct, he did not secure  
10 employment.

11       **Q.** And you also read from his deposition  
12 transcript that he was told that it was a  
13 difficult work climate for him in the area?

14       **A.** I can't say if he was told that. That's  
15 what he stated in his deposition, and also when  
16 you apply for social security disability you  
17 can't secure earnings over a \$1,000 a month.  
18 So it becomes an economic disincentive to  
19 continue to look for work when you're gaining  
20 disability because you can't have your cake and  
21 eat it, too.

22       **Q.** Well, let me ask you about that. Isn't it  
23 true that social security has what's called a  
24 ticket to work program? Are you aware of that?

25       **A.** Yes.

1 Q. So a person can receive social security  
2 disability benefits and also work at the same  
3 time?

4 A. Well, there's an explanation to that. Up  
5 to a certain dollar level and then the social  
6 security disability fades out.

7 Q. Okay, but again you're allowed to work and  
8 receive social security disability at the same  
9 time, isn't that true?

10 A. At a low threshold level, that is correct.

11 Q. Did you perform any vocational work in  
12 this case to determine if there were jobs in  
13 Mr. Shaw's geographic area that he would be  
14 qualified to perform?

15 A. I did not.

16 Q. Do you have any training as a vocational  
17 expert?

18 A. I am not a vocational expert.

19 Q. Are you aware that the Social Security  
20 Administration finds that someone Mr. Shaw's  
21 age, about mid fifties, can even qualify for  
22 social security disability benefits without a  
23 finding of total disability?

24 A. I'm sorry, could you restate that question?

25 Q. Sure. Are you aware that the social

1 Security Administration has what's called a grid  
2 system where somebody can qualify for social  
3 security disable without showing that they're  
4 totally disabled?

5 A. I'm not familiar with that.

6 Q. Are you aware that the Social Security  
7 Administration believes, has found that persons  
8 in the mid fifties are, have limited work  
9 capability because of their age?

10 A. I don't know if I can answer that. It's  
11 kind of a vague question and it would have to go  
12 to a specific person and the Social Security  
13 Administration's examination based upon the  
14 person's background, training, experience, and  
15 the job they're working, or they had previously  
16 worked at, so --

17 Q. So you're not aware of that kind of  
18 standard from social security that somebody mid  
19 fifties is deemed to be already at a  
20 disadvantage in the work place?

21 A. I don't think the Social Security  
22 Administration deems just because of age a  
23 finding of disability. I think that would be a  
24 scary thought for society, but I think they've  
25 examined a person in their total presentation

1 with regard to their previous employment,  
2 alleged injuries, training and background.

3 Q. Would you agree that using the social  
4 security retirement age is an acceptable  
5 standard in determining how long a person could  
6 work?

7 A. It's one metric. I don't think it's the  
8 most accurate metric.

9 Q. Okay, but it's an acceptable metric?  
10 You might not use it, but it's an accepted  
11 measurement in your field, is that right?

12 A. Economists will use it, yes.

13 Q. And it's true that the Social Security  
14 Administration uses its own standards rather  
15 than these private studies that you use, is  
16 that right?

17 A. Their standards for what?

18 Q. For retirement.

19 A. I don't think they have standards. I think  
20 actually the retirement age is set forth by the  
21 administrative agency itself and it's not based  
22 upon statistical data.

23 Q. And if I were to say to the Social Security  
24 Administration that I wanted to retire a year  
25 before the age they have set for retirement, are

1 they going to give me the full benefits?

2 A. They will not. Full benefits of  
3 retirement?

4 Q. Yes.

5 A. Okay. They will not. You can get benefits  
6 before your social security age, but they will  
7 not be the full benefit.

8 MR. CROCENZI: That's all I have. Thank  
9 you.

10 THE COURT: Any redirect?

11 REDIRECT BY MS. SALTZ:

12 Q. Just very, very brief. Mr. Staller, I  
13 believe when counsel was asking you questions as  
14 to the period of time that Mr. Shaw was looking  
15 for employment --

16 A. Yes.

17 Q. -- you testified it would have been  
18 probably sometime between February 27th, 2007  
19 to 2010?

20 A. To the day of his deposition -- well, that  
21 would be the most it could be, but in his  
22 deposition he said he really stopped looking for  
23 work as of 2008.

24 MS. SALTZ: That's all I wanted to clarify.  
25 Thank you. I have no further questions, Your

1 Honor.

2 THE COURT: All right, I have no questions,  
3 Mr. Staller. You may step down.

4 THE WITNESS: Thank you.

5 THE COURT: Ladies and gentlemen, I do want  
6 to give you a little instruction while it's  
7 fresh in your mind with respect to the  
8 distinction between the Americans with  
9 Disabilities Act and a determination of  
10 disability under the act and a determination of  
11 disability under the auspices of the Social  
12 Security Administration. As you know, there  
13 has been evidence in this case that in his  
14 application for social security disability  
15 benefits Mr. Shaw represented that he was  
16 disabled and unable to work.

17 The fact that a person is unable to work  
18 for purposes of receiving social security  
19 disability benefits does not necessarily mean  
20 that he is not a qualified individual under the  
21 Americans with Disabilities Act. Under the  
22 Americans with Disabilities Act -- excuse me,  
23 unlike the Americans with Disabilities Act a  
24 finding of disability by the Social Security  
25 Administration does not take into account

1 whether a person may be able to perform the  
2 essential functions of a job with reasonable  
3 accommodation.

4       However, you may consider Mr. Shaw's  
5 statements in the social security disability  
6 application in determining whether he was a  
7 qualified individual, and I'll give you  
8 additional information about a qualified  
9 individual under the Americans with Disabilities  
10 Act in my final instructions. Ladies and  
11 gentlemen, it is 5:00. You may have heard some  
12 thunder outside, the weather is very bad, so  
13 please drive carefully home. Hopefully this is  
14 just a passing storm.

15       Get a good night's sleep, come back  
16 refreshed, we'll have some additional testimony  
17 tomorrow. I am confident that the case will be  
18 in your hands sometime by late morning. Please  
19 refrain from any independent research, please  
20 refrain from any conversations among yourselves  
21 or with anyone else about what you have seen and  
22 heard so far regarding this case. You will have  
23 that opportunity tomorrow during the course of  
24 your final deliberations. We're in recess until  
25 9:00 tomorrow morning. Ms. McKinney, you may



1 escort the jury.

2 (Jury recessed at 5:00 p.m.)

3 THE COURT: Ladies and gentlemen, please be  
4 seated. Logistically, counsel, if I could have  
5 the identity of the time frame for when each of  
6 the objections is, if you could, each of the  
7 objections are noted on the testimony, on the CD  
8 of the testimony of Dr. Oplinger. We'll make  
9 those rulings later on this evening and provide  
10 them to you first thing tomorrow morning.

11 Ms. Saltz, my understanding is that deposition  
12 is the only thing you have left?

13 MS. SALTZ: Correct, and I believe it is  
14 fifty --

15 THE COURT: It's fifty minutes.

16 MR. CROCENZI: Fifty minutes, yes.

17 MS. SALTZ: Yes.

18 THE COURT: All right. Then you rest, do  
19 you anticipate any rebuttal testimony?

20 MR. CROCENZI: Not right now. We'll think  
21 about it overnight, Your Honor.

22 THE COURT: All right.

23 MR. CROCENZI: If there is it's going to be  
24 very limited.

25 THE COURT: Okay. Then I think we'll be

1     able to close and charge tomorrow morning. I  
2     have a draft of the jury instructions prepared.  
3     I don't believe I'm going to be -- unfortunately  
4     I don't believe I'm going to be able to get  
5     those to you immediately. If you want to stick  
6     around for a little while we may be able to get  
7     copies to you. Let me get with my staff and  
8     find out where we are in terms of that draft,  
9     but maybe it would help if you could take a  
10    quick look at them before we get started  
11    tomorrow. That way our charge conference can  
12    move forward rather quickly. Does that sound  
13    acceptable?

14           MS. SALTZ: Absolutely, especially  
15    considering closings are going to be coming  
16    shortly afterwards.

17           THE COURT: Right. Well, why don't we do  
18    this. Let's take a break for fifteen minutes.  
19    Let me see if I can get you the charge, a draft  
20    of the charge in that period of time, I think I  
21    can, and then we'll have our charge conference  
22    after Dr. Oplinger's deposition is played  
23    tomorrow. That will give you the evening to  
24    look it over and you can raise any objections  
25    that you have and we can address them after

1 Dr. Oplinger's deposition is played. okay?

2 Thank you. We are in recess until 9:00 tomorrow  
3 morning. Just stick around for fifteen minutes  
4 and we'll get you that draft.

5 (Trial adjourned at 5:03 p.m.)  
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Ricky A. Shaw vs. Cumberland Truck Equipment Co.

1:09-CV-00359

Jury Trial Proceedings, Day 3

18 May 2011

I hereby certify that the proceedings  
and evidence are contained fully and accurately  
in the notes taken by me on the trial of the  
above case, and that this copy is a correct  
transcript of the same.

s/ Wesley J. Armstrong

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Wesley J. Armstrong

Registered Merit Reporter

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